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No.

98-796

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**In the Supreme Court of the United States**

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

AND

J. DANIEL KIMEL, JR., ET AL.

v.

FLORIDA BOARD OF REGENTS

UNITED STATES OF AMERICA, PETITIONER

AND

WELLINGTON N. DICKSON, A/K/A "DUKE"

v.

FLORIDA DEPARTMENT OF CORRECTIONS

UNITED STATES OF AMERICA, PETITIONER

AND

RODERICK MACPHERSON AND MARVIN NARZ

v.

UNIVERSITY OF MONTEVALLO

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

**PETITION FOR A WRIT OF CERTIORARI**

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### QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.



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**PETITION FOR A WRIT OF CERTIORARI**

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit in these cases.

### **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-56a) is reported at 139 F.3d 1426. The opinions of the district courts in *Kimel v. Florida Board of Regents* (App., *infra*, 57a-62a), and *Dickson v. Florida Department of Corrections* (App., *infra*, 72a-76a), are unreported. The opinion of the district court in *MacPherson v. University of Montevallo* (App., *infra*, 63a-71a) is reported at 938 F. Supp. 785.

### **JURISDICTION**

The court of appeals entered its judgments on April 30, 1998. Petitions for rehearing were denied on August 17, 1998. App., *infra*, 77a-79a, 81a-83a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The relevant constitutional and statutory provisions involved are set forth at App., *infra*, 86a-102a.

### **STATEMENT**

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivi-

sion of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).<sup>1</sup> The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 \* \* \*, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

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<sup>1</sup> The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. II 1996). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (Supp. II 1996); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. II 1996). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) & (b)(2) (Supp. II 1996). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (state) (Supp. II 1996).



2. In *Kimel v. Florida Board of Regents*, plaintiff J. Daniel Kimel and others are current and former faculty and librarians at Florida State University and Florida International University. They filed suit in federal district court alleging, *inter alia*, that the respondent's decision not to provide them with certain salary increases "was an intentional act of age discrimination" in violation of the ADEA. Kimel Complaint, C.A. J.A. 91-6. Respondent Florida Board of Regents moved to dismiss on the ground of Eleventh Amendment immunity. The district court denied the motion. The court held that the ADEA contained a clear abrogation of immunity, and the abrogation was valid because the ADEA was a proper exercise Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. App., *infra*, 57a-62a.

In *Dickson v. Florida Department of Corrections*, plaintiff Wellington N. Dickson is a correctional officer employed by respondent Florida Department of Corrections. He filed suit in federal district court alleging that respondent failed to promote him and took other adverse employment action against him in violation of the ADEA and the Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.* App., *infra*, 72a. Respondent Florida Department of Corrections moved to dismiss on the ground of Eleventh Amendment immunity. The district court denied the motion. The court held that both the ADEA and the Disabilities Act contained clear abrogations of immunity, and that the abrogations were valid because the ADEA and the Disabilities Act were proper exercises of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. App., *infra*, 73a-76a.

Finally, in *MacPherson v. University of Montevallo*, the plaintiffs Roderick MacPherson and Marvin Narz are two associate professors employed by the University of Montevallo, which is an instrumentality of the State of Alabama. App., *infra*, 63a-64a. They filed suit in federal district court alleging, *inter alia*, that respondent University of Montevallo "has engaged in a pattern and practice of discrimination against them and a continuing practice of treating younger faculty members more favorably than older faculty members with regard to salaries and promotions," in violation of the ADEA. App., *infra*, 64a. Respondent University of Montevallo defended in part on the ground that the Eleventh Amendment barred the litigation. Although the district court ruled that Congress clearly intended to abrogate States' Eleventh Amendment immunity, the court also held that Congress had no power to do so because the ADEA could not have been enacted pursuant to Congress's authority to enforce the Fourteenth Amendment. App., *infra*, 65a-71a.

3. Plaintiffs in *MacPherson* appealed from the dismissal of their action, while the defendants in *Kimel* and *Dickson* took interlocutory appeals of right from the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). On appeal, the United States intervened in each action to defend the constitutionality of the ADEA's abrogation of States' Eleventh Amendment immunity. See 28 U.S.C. 2403(a). The court of appeals consolidated the cases for argument and concluded that the ADEA does not abrogate the States' Eleventh Amendment immunity. App., *infra*, 1a-56a.

The majority was divided on the rationale for its decision, one judge finding that Congress did not clearly



state an intent to abrogate Eleventh Amendment immunity, and the other judge concluding that Congress lacked the power to abrogate Eleventh Amendment immunity because the ADEA is not a proper exercise of congressional power under Section 5 of the Fourteenth Amendment.

Judge Edmondson found that Congress did not make its intent to abrogate Eleventh Amendment immunity "as clear as is the summer's sun," App., *infra*, 9a, because the statute does not contain "in one place, a plain, declaratory statement that States can be sued by individuals in federal court." *Id.* at 7a. In his view, the ADEA's enforcement provisions, 29 U.S.C. 626(b) and (c), are consistent with the enforcement of the ADEA against state defendants by the federal government alone in federal court and by private plaintiffs in state court. App., *infra*, 4a n.4, 11a & n.13.

Judge Cox did not reach the question of the clarity of Congress's intent to abrogate, but concurred in part in the judgment on the ground that the ADEA was not a proper exercise of power under Section 5 of the Fourteenth Amendment and therefore could not give rise to authority to abrogate the States' Eleventh Amendment immunity. Reviewing the legislative history of the ADEA's extension to the States, Judge Cox concluded that "Congress did not enact the ADEA as a proportional response to any widespread violation of the elderly's constitutional rights," App., *infra*, 48a, and thus was not exercising the power to "enforce the Fourteenth Amendment rights the Supreme Court has recognized." *Id.* at 45a.

Chief Judge Hatchett, dissenting from the majority's disposition of the ADEA claims, disagreed on both points. Declining to require Congress to use "any 'magic words' to abrogate effectively," Chief Judge

Hatchett agreed with "virtually every other court that has addressed the question" that "Congress made an 'unmistakably clear' statement of its intent to abrogate the states' sovereign immunity in the ADEA." App., *infra*, 18a, 20a.

Chief Judge Hatchett also joined other courts in concluding "that the ADEA falls squarely within the enforcement power that Section 5 of the Fourteenth Amendment confers on Congress." App., *infra*, 24a. He found that Congress prohibited age discrimination in employment because it had determined that such discrimination "was generally based on unsupported stereotypes." *Id.* at 29a. He noted that the statutory scheme enacted by Congress was tailored to ferreting out such instances of arbitrary discrimination because it permits employers to defend their age-based decisions on the grounds that such distinctions are "bona fide occupational qualification[s] reasonably necessary to the normal operation of the particular business," or are based on "reasonable factors other than age." *Id.* at 32a n.12 (quoting 29 U.S.C. 623(f)(1)).<sup>2</sup>

### REASONS FOR GRANTING THE PETITION

The judgment of the Eleventh Circuit has significantly eroded the scope and operation of important civil rights legislation. The decision, moreover, is in direct conflict with the rulings of five other circuits, which have upheld the ADEA's abrogation of States' Eleventh Amendment immunity. The issues have thus been

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<sup>2</sup> With regard to the claim raised in *Dickson* involving the Disabilities Act, Judge Edmondson and Chief Judge Hatchett agreed that the Disabilities Act validly abrogated the States' Eleventh Amendment immunity. App., *infra*, 13a-15a, 21a, 33a-41a. Judge Cox dissented. *Id.* at 53a-56a. See also *Seaborn v. Florida*, 143 F.3d 1405, 1407 (11th Cir. 1998).

thoroughly aired in the courts of appeals; postponing review is not likely to contribute to the reasoned resolution of the questions presented. Furthermore, cases presenting the same issues are pending in three other circuits. The questions presented are thus of recurring importance, and conflicting decisions are likely to proliferate in the courts of appeals. Accordingly, this Court's review is warranted.

1. Following this Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the courts of appeals have issued directly conflicting decisions on whether the ADEA abrogates the States' Eleventh Amendment immunity from suit in federal court. As this Court explained in *Seminole Tribe*, the abrogation inquiry contains two elements: "first, [we ask] whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' \* \* \* and second, [we ask] whether Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). The conflict in the courts of appeals embraces both the question of congressional intent and of congressional power to abrogate.

a. The opinion of Judge Edmondson below (App., *infra*, 2a-15a), like the Eighth Circuit's decision in *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (1998), has declared that the ADEA "does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity." *Humenansky*, 152 F.2d at 825. Five other circuits expressly disagree, finding Congress's intent to abrogate manifest in the ADEA's text. See App., *infra*, 12a n.14, and *Humenansky*, 152 F.3d at 825 & n.2 (both noting disagreement); see also *Migneault v. Peck*, No. 97-2099, 1998 WL 741545, at \*3

(10th Cir. Oct. 23, 1998) (citing *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1543-1544, 1546 (10th Cir. 1997)) (Congress clearly expressed its intent to abrogate in the text of the ADEA); *Coger v. Board of Regents*, 154 F.3d 296, 301-302 (6th Cir. 1998) (same); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998) ("We join the overwhelming majority of our sister circuits in holding that Congress clearly expressed its intention to abrogate states' immunity in private suits for violations of the ADEA."); *Scott v. University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998) ("[W]e hold that the language of § 626(b) and § 216(b) in conjunction with the specific extension of the ADEA to state employers unequivocally expresses Congress's intent that state employers may be sued under the ADEA in federal courts."); *Goshtasby v. Board of Trustees*, 141 F.3d 761, 765-766 (7th Cir. 1998) (adhering to *Davidson v. Board of Governors of State Colleges & Univs.*, 920 F.2d 441, 443 (7th Cir. 1990)). Two additional courts of appeals have indicated in dicta that Congress's intent to abrogate is sufficiently clear. See *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996); *Santiago v. New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir. 1991), cert. denied, 502 U.S. 1094 (1992). The issue is currently pending in three circuits. See, e.g., *Jones v. WMATA*, No. 97-7186 (D.C. Cir.) (oral argument heard Sept. 9, 1998); *Davis v. University of Conn.*, No. 97-9367 (2d Cir.) (oral argument heard Sept. 16, 1998); *Young v. Pennsylvania House of Representatives*, No. 98-7130 (3d Cir.) (oral argument heard Oct. 27, 1998).<sup>3</sup>

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<sup>3</sup> The First Circuit also ruled, prior to *Seminole Tribe*, that Congress intended to abrogate the States' Eleventh Amendment

The question of Congress's intent to abrogate Eleventh Amendment immunity in the ADEA has thus been extensively evaluated and considered by the courts of appeals. Postponing review will not contribute measurably to analysis of the issue. The conflict is firmly entrenched and incapable of resolution except by this Court.

b. Judge Cox concluded (App., *infra*, 42a-56a) that, even if Congress's intent to abrogate were clear, Congress lacked power to effect such an abrogation because the ADEA is not a proper exercise of Congress's legislative power under Section 5 of the Fourteenth Amendment. The Eighth Circuit has similarly ruled that the ADEA could not have been enacted pursuant to Congress's Section 5 power. *Humenansky*, 152 F.3d at 826-828. Those decisions are in direct conflict with the rulings of the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, all of which have upheld the ADEA as proper Section 5 legislation. See *Migneault*, 1998 WL 741545, at \*\*3-7 (citing *Hurd*, 109 F.3d at 1546); *Coger*, 154 F.3d at 302-307; *Keeton*, 150 F.3d at 1057-1058; *Scott*, 148 F.3d at 500-503; *Goshtasby*, 141 F.3d at 766-772.<sup>4</sup> The pendency of three other cases presenting the same question (see p. 9, *supra*) demonstrates that the conflict over the scope of Congress's Section 5 power is not likely to disappear.<sup>5</sup> This Court's review is necessary to

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immunity for ADEA suits. See *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700-701 (1st Cir. 1983).

<sup>4</sup> Prior to this Court's decision in *City of Boerne v. Flores*, *supra*, the First and Fourth Circuits had also ruled that the ADEA falls within Congress's Section 5 power. See *Ramirez*, 715 F.2d at 698-700; *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); see also *Blanciak*, 77 F.3d at 695 (dicta).

<sup>5</sup> The courts of appeals have candidly acknowledged that their rulings are in conflict. See *Migneault*, 1998 WL 741545, at \*7 ("We



resolve that conflict and to clarify the scope of Congress's "comprehensive remedial power" under Section 5 of the Fourteenth Amendment. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (O'Connor, J.) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980)).

2. The questions presented are of broad and enduring importance and thus merit this Court's review. The ADEA is "part of a wider statutory scheme to protect employees in the workplace" from "invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). As a consequence of the Eleventh Circuit's decision here and the Eighth Circuit's decision in *Humenansky v. Regents of the University of Minnesota*, *supra*, the operation of important civil rights legislation in one-fifth of the States has been significantly impaired. Unlike litigants in the circuits where the ADEA's abrogation of Eleventh Amendment immunity has been sustained, employees of state governments in the

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recognize there is a split in the circuits on this issue."); *Humenansky*, 152 F.3d at 826-827 (noting that the "circuits to consider the issue since *Flores* have reached conflicting conclusions"); *Coger*, 154 F.3d at 302 (citing *Kimel* with "But see"); *Keeton*, 150 F.3d at 1057 (same); *Scott*, 148 F.3d at 499 n.3 (noting that *Kimel* "reached the opposite result"). Indeed, subsequent to the Eleventh Circuit's decision in these cases, the Seventh Circuit expressly "reaffirm[ed]" its holding that "the ADEA is a proper exercise of Congress's § 5 enforcement power under the Fourteenth Amendment," and explained that "[t]he intervening and contrary decision from the Eleventh Circuit [in *Kimel*] has not given us reason to overrule *Goshtasby*." *Debs v. Northeastern Ill. Univ.*, 153 F.3d 390, 394 (7th Cir. 1998).

Eleventh and Eighth Circuits cannot fully enforce their federal rights under the ADEA in federal court.<sup>6</sup>

The questions of the clarity with which Congress must speak to abrogate state immunity and the scope of Congress's Section 5 enforcement power, moreover, are of great and recurring importance to the federal government. Judge Edmondson's opinion in this case, like the Eighth Circuit's decision in *Humenansky*, imposes stringent conditions on Congress's exercise of its legislative power, in the form of requiring elaborate verbal formulations to effect an Eleventh Amendment abrogation. Because those conditions do not apply in other circuits, this Court should grant review to establish a single, uniform test for effective abrogation by Congress of Eleventh Amendment immunity.

Furthermore, Eleventh Amendment issues similar to those presented by this case are being actively litigated in numerous cases arising under other federal statutes, such as the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. 206(d), and the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* See, e.g., *Clark v. California*, 123 F.3d 1267, 1269-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 837-838 (6th Cir. 1997); *Garrett v. Board of Trustees*, No. 98-6069 (11th Cir.) (pending). While the provisions and scope of those statutes differ in many respects from those of the ADEA, the resolution of the abrogation issues under

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<sup>6</sup> The ability to enforce federal rights in state court is the issue presented in *Alden v. Maine* (cert. granted, No. 98-436 (Nov. 9, 1998)), reviewing the holding of the Maine Supreme Judicial Court that state courts may refuse to entertain private causes of action to enforce federal statutory rights on the basis of state sovereign immunity.

the ADEA may shed light on the resolution of those issues under other statutes.

3. This Court's review is necessary to correct the court of appeals' erroneous determination that Congress did not abrogate the States' Eleventh Amendment immunity in the ADEA.

After extensive study and hearings (see *EEOC v. Wyoming*, 460 U.S. 226, 229-231 (1983)), Congress enacted the ADEA to redress a serious national problem of arbitrary discrimination against older workers by employers based on "inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); see also 29 U.S.C. 621. Recognizing that age may sometimes be a legitimate criterion for employment decisions, Congress created a calibrated prohibition that, in certain circumstances, bars the use of age as a proxy for the ability of workers over the age of 40 (29 U.S.C. 631(a)), unless age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(a) and (f)(1). The ADEA thus requires that employers either base their employment decisions on "reasonable factors other than age" (29 U.S.C. 623(f)(1)), or else demonstrate that age is a reasonably necessary employment consideration.

a. Congress has "unequivocally expresse[d] its intent to abrogate" the States' Eleventh Amendment immunity in the text of the ADEA. See *Seminole Tribe*, 517 U.S. at 55 (quoting *Green*, 474 U.S. at 68). In 1974, Congress extended the protections of the ADEA to state employees. See 29 U.S.C. 630(b) and (f); see also Act of Apr. 8, 1974, Pub. L. No. 93-259, § 28(a)(2),



88 Stat. 74.<sup>7</sup> In so doing, Congress placed States as employers squarely within an existing enforcement scheme that specifically and expressly contemplates suits by employees against employers in federal court. First, the ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). Second, the ADEA expressly incorporates some of the enforcement mechanisms of the Fair Labor Standards Act of 1938, including a provision that authorizes employees to file suit "against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction." 29 U.S.C. 216(b) (emphasis added). See 29 U.S.C. 626(b).<sup>8</sup>

To abrogate Eleventh Amendment immunity, Congress need not mention the Eleventh Amendment or

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<sup>7</sup> Neither respondents nor the court of appeals disputes that the purpose of the 1974 amendment was to render the States subject to the ADEA's substantive terms, or that the extension was a valid exercise of Congress's power under the Commerce Clause. See *Gregory v. Ashcroft*, 501 U.S. 452, 467-468 (1991); *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). The Commerce Clause, however, does not independently support Congress's abrogation of the States' Eleventh Amendment immunity from ADEA suits brought by individuals in federal court. See *Seminole Tribe*, 517 U.S. at 57-73. In both *Gregory*, 501 U.S. at 468, and *EEOC v. Wyoming*, 460 U.S. at 243 & n.18, the Court "reserved the questions whether Congress might also have passed the ADEA extension pursuant to its powers under § 5 of the Fourteenth Amendment, and whether the extension would have been a valid exercise of that power." *Gregory*, 501 U.S. at 468.

<sup>8</sup> "Public agency" is further defined to include "the government of a State or political subdivision thereof; any agency of \* \* \* a State, or a political subdivision of a State." 29 U.S.C. 203(x).

inant particular words or phrases. The statute need only clearly create a cause of action against States and grant jurisdiction to federal courts to hear those claims. See *Seminole Tribe*, 517 U.S. at 47; *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). In one sentence, Section 216(b) evinces Congress's intent that employees be permitted to sue state employers in federal court.<sup>9</sup> No more is required. By insisting on an elaborate explication of congressional intent, the decisions of the court of appeals here and in *Humenansky v. Regents of the University of Minnesota*, *supra*, impermissibly intruded on Congress's legislative authority and discretion.

b. In *Seminole Tribe*, this Court reiterated that Congress retained its power to abrogate Eleventh Amendment immunity when enacting "appropriate" legislation to "enforce" the provisions of the Fourteenth Amendment. See 517 U.S. at 65-66, 71-72 n.15 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Judge Cox's determination (App., *infra*, 48a-53a), echoed by the *Humenansky* court (152 F.3d at 826-828), that the ADEA is not proper Section 5 legislation reflects an incorrect application of this Court's precedents.

In *City of Boerne v. Flores*, *supra*, this Court explained what constitutes "appropriate" legislation under Section 5 of the Fourteenth Amendment. The Court emphasized that the authority to enforce the Fourteenth Amendment is a broad power to remedy

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<sup>9</sup> In the court of appeals, Judge Edmondson reasoned that "making it specific that suits can be brought in federal court does not make it more clear that suits against States by private parties in federal court are in order." App., *infra*, 11a n.11. But that argument overlooks Congress's specific direction that ADEA suits could be brought by "any" employee against "any employer (including a public agency)." 29 U.S.C. 216(b), 626(b) and (c)(1).

past and present discrimination and to prevent future discrimination. *Id.* at 2163, 2172. Accordingly, under Section 5, Congress can prohibit activities that themselves are not unconstitutional when it acts to enforce a constitutional right. *Id.* at 2163, 2167, 2169; see also *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Congress may prohibit state conduct that “create[s] the risk” that constitutional rights will be infringed). The Court held, however, that there must be a “congruence and proportionality” between the identified constitutional harms and the statutory remedy. *Flores*, 117 S. Ct. at 2164.

The ADEA passes muster for three reasons. First, the ADEA seeks to redress and prevent unconstitutionally arbitrary discrimination against older workers and thus enforces a recognized constitutional right. While classifications based on age are subject only to rational basis review, see, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-314 (1976), there can be no question that “arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review.” *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). In every case, the ADEA places the burden of persuasion on the employee to prove, in the first instance, that he or she was adversely affected “because of such individual’s age.” 29 U.S.C. 623(a)(1). The ADEA’s provisions thus are not triggered until an employee demonstrates unequal treatment and, concomitantly, a risk that unconstitutionally arbitrary action lurks.<sup>10</sup>

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<sup>10</sup> The Section 5 enforcement power is not confined to categorizations that already receive heightened scrutiny under the Equal Protection Clause. Section 5’s plain text admits of no such

Moreover, Congress's extensively studied and exhaustively considered determination that there is a need to provide statutory protection for victims of age discrimination reflects a factual judgment, based upon a comprehensive legislative record that, while age can sometimes be used constitutionally in employment decisions, it has often been used arbitrarily and irrationally in that context. See *EEOC v. Wyoming*, 460 U.S. at 229-231. "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes" that physical and mental stamina invariably declined with age. *Hazen Paper Co.*, 507 U.S. at 610. It has long been recognized that Congress's Section 5 power "include[s] the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 488 U.S. at 490 (O'Connor, J.). As an exercise of Congress's "specially informed legislative competence", the ADEA's cabined prohibition of age discrimination falls squarely within the Section 5 enforcement power. *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966); see also *Flores*, 117 S. Ct. at 2172 ("It is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.") (internal quotation marks omitted).

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distinction. "The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it." Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham).

Second, the ADEA provides a discrete and calibrated remedy for a narrowly defined range of governmental (and private) conduct. The ADEA applies only to employment. Congress has thus carefully confined its prohibition of age discrimination to an area of vital concern and importance to the affected individuals—their ability to earn a living and thus to subsist.<sup>11</sup>

Even within the area of employment, moreover, Congress has provided significant exemptions for States. See 29 U.S.C. 623(f) and (j) (permitting mandatory retirement ages for law enforcement officers and firefighters), 630(f) (excluding elected officials and their personal staffs, and persons “on the policymaking level”) (1994 & Supp. II 1996). Furthermore, where age restrictions are in fact a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business,” 29 U.S.C. 623(f)(1), an employer may freely use age as a criterion for employment decisions. The primary obligation that the ADEA imposes on the State as employer, then, is not to treat qualified older workers differently simply because they

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<sup>11</sup> This Court has long recognized that the “right to work for the support of themselves and families” is a fundamental component of the liberty guaranteed by the Fourteenth Amendment. See *Smith v. Texas*, 233 U.S. 630, 636, 641 (1914) (“In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.”).



are viewed as "old." See *Hazen Paper Co.*, 507 U.S. at 611.<sup>12</sup>

Third, Congress has acted in a context in which the consequences of state action have a direct impact on federal operations and the federal fisc. See *EEOC v. Wyoming*, 460 U.S. at 231 ("arbitrary age discrimination \* \* \* deprive[s] the national economy of the productive labor of millions of individuals and impose[s] on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits"). The fact that the regulated state conduct reverberates far beyond the state's borders and is intertwined with independent federal governmental interests underscores the proportionality of Congress's remedial action in the ADEA.

In sum, given the serious consequences for individuals and the federal government of irrational age discrimination and the carefully measured remedy imposed on State employers, the ADEA manifests a "congruence" between the "means used" (i.e., prohibiting employment decisions based on age unless the employer can show that using an employee's age, as opposed to actual indicia of ability, is reasonably necessary), and the "ends to be achieved" (i.e., preventing arbitrary discrimination based on age). See *Flores*, 117 S. Ct. at 2169. As appropriate Section 5 legislation, therefore, the ADEA abrogated the States' Eleventh Amendment immunity from suit in federal court.

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<sup>12</sup> By contrast, the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb, which was at issue in *Flores*, "intru[ded] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Flores*, 117 S. Ct. at 2170.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1998

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT**

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**Nos. 96-2788, 96-3773 and 96-6947**

**J. DANIEL KIMEL, JR., RALPH C. DOUGHERTY,  
BURTON H. ALTMAN, ROBERT W. BEARD,  
VALDALL K. BROCK, ET AL., PLAINTIFFS-APPELLEES**

**DORIS C. BAKER, ET AL., PLAINTIFFS**

*v.*

**STATE OF FLORIDA BOARD OF REGENTS,  
DEFENDANT-APPELLANT**

**WELLINGTON N. DICKSON, A.K.A. DUKE,  
PLAINTIFF-APPELLEE**

*v.*

**FLORIDA DEPARTMENT OF CORRECTIONS,  
JACKSON COUNTY, DEFENDANT-APPELLANT**

**JACKSON CORRECTIONAL INSTITUTION,  
JIM FOLSOM, AND JAMES EDWARD CHILDS,  
A.K.A. J.E. CHILDS, MAJOR, DEFENDANTS**

**RODERICK MACPHERSON, MARVIN NARZ,  
PLAINTIFFS-APPELLANTS**

*v.*

**UNIVERSITY OF MONTEVALLO, DEFENDANT-APPELLEE**

**NATIONAL EMPLOYMENT LAWYERS  
ASSOCIATION, AMICUS**

**UNITED STATES OF AMERICA,  
INTERVENOR-APPELLANT**

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Appeals from the United States District Court  
for the Northern District of Florida

Appeal from the United States District Court  
for the Northern District of Alabama

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April 30, 1998

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Before: HATCHETT, Chief Judge, and EDMONDSON and  
COX, Circuit Judges.

EDMONDSON, Circuit Judge:<sup>1</sup>

Three cases presenting the same or similar issues of Eleventh Amendment immunity were consolidated and are addressed in this appeal. In all three cases, the States, or their agencies, submitted motions to dismiss based on Eleventh Amendment immunity. The issues in this appeal are whether Congress abrogated States' Eleventh Amendment immunity for suits under the Age Discrimination in Employment Act ("ADEA") and under the Americans with Disabilities Act ("ADA").<sup>2</sup>

Two district courts, the Northern District of Florida, Tallahassee Division, in *State of Florida, Board of Regents v. Kimel* ("*Kimel*") and the Northern District

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<sup>1</sup> Judge Edmondson announces the judgment for the Court in this case. Judge Cox concurs in the result in Part I of Judge Edmondson's opinion but decides the issue on a different basis. Chief Judge Hatchett dissents in Part I. Chief Judge Hatchett concurs in the result in Part II of Judge Edmondson's opinion but also writes separately on the issue. Judge Cox dissents in Part II of the opinion.

<sup>2</sup> Only case number 96-3773, *Florida Dep't of Corrections v. Dickson*, presents the Eleventh Amendment issue for the ADA.

of Florida, Panama City Division, in *Florida Department of Corrections v. Dickson* ("Dickson"), held that Congress effectively abrogated States' sovereign immunity with its enactment of the ADEA (and for *Dickson* the ADA) and denied the motions to dismiss. But, the Northern District of Alabama in *MacPherson, Narz v. University of Montevallo* ("*MacPherson*") granted the State's motion to dismiss on Eleventh Amendment grounds. We agree with the Northern District of Alabama that suits by private parties against States in federal court for ADEA violations are prohibited by the Eleventh Amendment.

The cases were appealed for us to decide whether Congress abrogated sovereign immunity when it enacted the relevant statutes.<sup>3</sup> Because this appeal presents only questions of law, not dependent upon factual determinations, the facts of each Plaintiff's claim will not be discussed.

### Discussion

A district court's order denying or granting a motion to dismiss a complaint against a State based on the Eleventh Amendment's grant of sovereign immunity is reviewed by this court *de novo*. See *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1021 (11th Cir. 1994),

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<sup>3</sup> Plaintiff Wellington Dickson claims we lacked jurisdiction to hear the State of Florida's appeal of the denial of its motion to dismiss. This appeal is properly before this Court under the collateral order doctrine. Like qualified immunity, a decision on this issue after trial would defeat the State's right to be immune from trial. The Eleventh Amendment provides the States with immunity from suit, not just immunity from damages. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S. Ct. 684, 688, 121 L.Ed.2d 605 (1993).

*aff'd*, 517 U.S. 44, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996).

The Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This provision not only prohibits suits against States in federal court by citizens of other States, but also prohibits suits brought against a State in federal court by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L.Ed. 842 (1890).<sup>4</sup>

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996), the Supreme Court recently considered the issue of when Congress can properly abrogate States' Eleventh Amendment immunity. The Court's decision in *Seminole* overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989), which held that acts taken by Congress pursuant to the Commerce Clause could, if sufficiently clear, abrogate Eleventh Amendment immunity. In *Seminole*, the Court specifically held that Congress had no authority to abrogate State sovereign immunity under the Eleventh Amendment when Congress acted pursuant to the Commerce Clause; the power to abrogate only exists under Section 5 of the

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<sup>4</sup> The Eleventh Amendment only prohibits suits by private parties against unconsenting States in *federal court*. See *Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7, 100 S. Ct. 2502, 2507 n. 7, 65 L.Ed.2d 555 (1980) (Eleventh Amendment principles are not applicable to suits in state court.).

Fourteenth Amendment.<sup>5</sup> In addition, the Court set out precisely what Congress must do to abrogate the States' immunity.

Two requirements must be satisfied before Eleventh Amendment immunity can be successfully abrogated by Congress. *Seminole*, 517 U.S. at 54, 116 S. Ct. at 1123. *First*, Congress must have intended to abrogate that immunity by providing "a clear legislative statement" of its intent—"making its intention unmistakably clear in the language of the statute."<sup>6</sup> *Id.* (citing *Blatchford v. Native Village of Noatak and Circle Village*, 111 S.Ct. 2578, 2584 [1991], and *Dellmuth v. Muth*, 491 U.S. 223, 224-25, 109 S.Ct. 2397, 2399-2400 [1989]). *Second*, Congress must have attempted to abrogate this immunity under proper constitutional authority. In other words, Congress must have enacted the statute at issue using its Fourteenth Amendment, Section 5, enforcement powers. *See Seminole*, 517 U.S. at 62-63, 116 S. Ct. at 1127-28.<sup>7</sup>

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<sup>5</sup> The enforcement provision of the Fourteenth Amendment provides:

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, § 5.

<sup>6</sup> For me, "unmistakably" strongly intensifies the implications of "clear;" and I take that message to heart.

<sup>7</sup> The Eleventh Amendment can also be abrogated by a State's waiver—actual consent—but no one claims that a waiver occurred in these cases.

### *I. Age Discrimination in Employment Act of 1967*

Although I believe good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment, I will not decide that question today;<sup>8</sup> questions of constitutional power should be decided only as a last resort. Instead, I focus on the ADEA's words and rest my decision on the lack of unmistakably clear legislative intent.

In searching the ADEA for an unequivocal statement of intent to abrogate, courts look only to the language of

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<sup>8</sup> This doubt is suggested by a variety of considerations, to state briefly a few: (1) where the Supreme Court has held that Congress enacted a statute pursuant to its Commerce Clause powers, we must be cautious about deciding that Congress could have acted pursuant to a different power. See *League of United Latin Amer. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 758-59 (5th Cir. 1993) ("Although there was some argument that Congress acted pursuant to its enforcement powers under the Fourteenth Amendment in passing the ADEA, the [Supreme] Court in *Gregory v. Ashcroft* ultimately concluded that Congress had acted *only* pursuant to its Commerce Clause powers.") (emphasis added); (2) where two statutes are enacted together in the same bill, like the ADEA and the Fair Labor Standards Act ("FLSA"), it seems reasonable that Congress enacted the bill—all portions of it—pursuant to the same authority. See 120 Cong. Rec. 7337 (1974) (FLSA enacted *only* pursuant to Congress's Commerce Clause power, especially considering that the FLSA [like the ADEA] initially only applied to private employers, who are not the proper subjects of Fourteenth Amendment enforcement); (3) when addressing a characteristic, such as age, that is not the kind of immutable characteristic as race, gender, or national origin, it is questionable that Congress could lawfully be acting to enforce the Fourteenth Amendment. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 310, 96 S. Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (Age does not rise to the level of a suspect or quasi-suspect class: it is a stage of life through which all persons go.).



the statute itself. *Dellmuth*, 491 U.S. at 228, 109 S. Ct. at 2401 (“[E]vidence of congressional intent must be both *unequivocal and textual* . . . [l]egislative history generally will be irrelevant” because if the intent is clear in the language of the statute, “recourse to legislative history will be unnecessary.”) (emphasis added). A court’s guess about Congress’s political will and subjective intentions—past, present, or future—is without consequence; only the statute and its language are to be considered. As directed by the Supreme Court, I do not go beyond the text of the ADEA in deciding whether it contains the requisite, unmistakably clear statement of intent to abrogate. *Id.*

This requirement—that the intent to abrogate be found in an unmistakably clear statement in the language of the statute—necessitates a high level of clarity by Congress. But, as the Supreme Court has observed, such a requirement of Congress is not too high when considering the important interests protected by the Eleventh Amendment. The Eleventh Amendment recognizes that States, as a matter of constitutional law, are special entities—still possessing attributes of sovereignty. The Amendment strikes a balance between the federal government and the States. To alter that balance, Congress must be unmistakably clear in its intent. *See Dellmuth v. Muth*, 491 U.S. at 226, 109 S. Ct. at 2400.

No unequivocal expression of an intent to abrogate immunity is unmistakably clear in the ADEA. No reference to the Eleventh Amendment or to States’ sovereign immunity is included. Nor is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court. To me, an intent on the part of Congress to abrogate the States’ con-

stitutional right to immunity is not sufficiently clear to be effective under Eleventh Amendment jurisprudence.<sup>9</sup>

In one section, 29 U.S.C. § 630, the ADEA defines employers to include States. In a different section, 29 U.S.C. § 626(b), which never mentions employers much less mentions States as defendants, the ADEA separately provides for enforcement by means of suits for legal or equitable relief in courts of competent jurisdic-

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<sup>9</sup> The ADEA presents a different situation from the one in *Seminole*, where the Court held that Congress clearly expressed its intent to abrogate immunity when Congress said, among other things, that jurisdiction was vested in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith. . . ." Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(I) (emphasis added). This section, along with the remedial scheme available to a tribe that files suit under section 2710, leaves no doubt "as to the identity of the defendant in an action under [this section]." *Seminole*, 517 U.S. at 56, 116 S. Ct. at 1124.

Unlike the ADEA, the Indian Gaming Regulatory Act at issue in *Seminole* creates a scheme of federal regulation of Indian-tribe gambling. Other than the suits authorized against States for their lack of good faith negotiations for Tribal-State compacts, the only enforcement provision of the Act is a civil fine that can be imposed by the Commission created by the Act. Thus, the only suits available to an entity other than the Commission are available to Indian tribes. And the only entities that the tribes can sue under the Act are States: no other means of enforcement are established.

The single-mindedness of the Act adds much clarity to its words. The ADEA, on the other hand, is more complicated. As a general proposition, it doubtlessly permits suits against a wide range of employers (public and private) and for various remedies (legal and equitable) and in different forums (state and federal courts). But this fact sheds little light on the narrow question of suits by individuals against States in federal court.

tion. This statutory structure does not provide the clarity needed to abrogate States' constitutional right to sovereign immunity. For abrogation to be unmistakably clear, it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate. Although we make no definite rule about it, the need to construe one section with another, by its very nature, hints that no *unmistakable or unequivocal* declaration is present. More important, when we do construe the various ADEA sections together, abrogation never becomes "as clear as is the summer's sun."<sup>10</sup>

"A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." See *Seminole*, 517 U.S. at 54, 116 S. Ct. at 1123 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244, 105 S. Ct. 3142, 3149, 87 L.Ed.2d 171 (1985)). "[T]hat Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim." *Blatchford*, 501 U.S. at 786 n. 4, 111 S. Ct. at 2585 n. 4.

Still, Plaintiffs argue, and all three district courts seemed to agree, that Congress's amendments to the ADEA in 1974—adding States, their agencies, and political subdivisions to the definition of "employer" (along with the original portions of the ADEA providing that the statute may be enforced in courts of competent jurisdiction)—represents the unmistakably clear legislative statement required to abrogate the Elev-

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<sup>10</sup> For background, see William Shakespeare, *King Henry the Fifth* act 1, sc. 2 (speech of Canterbury outlining Henry's claim to the French throne).



enth Amendment. This view (which is opposed by the State in *Dickson* ) seems to clash with the Supreme Court's precedents.

In *Employees of the Dep't of Public Health and Welfare v. Missouri*, 411 U.S. 279, 93 S. Ct. 1614, 36 L.Ed.2d 251 (1973), the Supreme Court held that the Fair Labor Standards Act ("FLSA") did not provide a sufficiently clear statement of intent to abrogate the Eleventh Amendment. As initially enacted, the FLSA (like the ADEA) did not apply at all to States. In 1966, the FLSA was amended to include certain State agencies in the definition of employer. This amendment, the Court held, did *not* provide the clear statement of intent to abrogate immunity, despite the provisions allowing suits in courts of "competent jurisdiction" against employers who violated the FLSA. *Id.* at 281, 93 S. Ct. at 1617. "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State." *Id.* Like the ADEA, there was no dispute that the FLSA applied to the State agencies set out in the FLSA; the dispute was only about what kinds of enforcement were available when dealing with States as defendant-employers.<sup>11</sup>

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<sup>11</sup> The ADEA's 29 U.S.C. § 626(b) refers to sections of a different Act, the FLSA, particularly to some of the FLSA enforcement provisions at issue in *Employees*. This statutory structure is hardly straightforward. In 1974, after *Employees*, Congress amended the FLSA. Those amendments changed the FLSA's enforcement provision to provide that suits could be brought against "employers (including a public agency)" in "any Federal or State court of competent jurisdiction." 29 U.S.C. § 216. (The FLSA as amended is similar to 29 U.S.C. § 626[c][1] in the ADEA itself.) Still, a federal court lacks "competent jurisdiction" if the Eleventh Amendment prohibits the suits against the State. *Employees*, 411

In a later decision, *Dellmuth v. Muth*, the Supreme Court held that the Education of the Handicapped Act (EHA) did not abrogate Eleventh Amendment immunity despite provisions allowing suit in federal district court and many provisions referring to the States as parties in suits of enforcement. See *Dellmuth*, 491 U.S. at 226-27, 109 S.Ct. at 2400-02. That the pertinent statute (like the ADEA) never mentioned either "the Eleventh Amendment or the States' sovereign immunity" was given weight. *Id.* at 230, 109 S. Ct. at 2402. Abrogation was not sufficiently clear. *Id.*

To include the States as employers under the ADEA, as in the FLSA, does not show an intent that the States be sued by private citizens in federal court—the kind of suit prohibited under the Eleventh Amendment.<sup>12</sup> The ADEA is enforceable against the States, despite sovereign immunity, through forms of relief other than direct suits by citizens in federal court.<sup>13</sup> Congress may have had these other forms of enforcement in mind when it

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U.S. at 281, 93 S. Ct. at 1617. So, making it specific that suits can be brought in federal court does not make it more clear that suits against States by private parties in federal court are in order. Other, private employers could be the intended defendants in such suits. And equitable relief might be available against state officials in federal courts. See *Edelman v. Jordan*, 415 U.S. 651, 663-64, 94 S. Ct. 1347, 1356-57, 39 L.Ed.2d 662 (1974).

<sup>12</sup> Plaintiffs' argument in this appeal mistakenly frames this issue as one of the constitutionality of the relevant statutes. The statutes' basic constitutionality is not in jeopardy. This appeal only addresses whether the ADEA and ADA can be enforced through suits by private parties in federal court against offending States.

<sup>13</sup> For examples of other methods of ensuring the States' compliance with federal law, see *Seminole*, 517 U.S. at 71 n. 14, 116 S. Ct. at 1131 n. 14.

amended the statute to include States as employers. Thus, the general application of the law to the States does not make the requisite clear statement that Congress also intended the ADEA to abrogate the Eleventh Amendment specifically.

I do not dispute that some provisions of the ADEA make States look like possible defendants in suits alleging violations of the ADEA. I accept that these provisions could support an "inference that the States were intended to be subject to damages actions for violations of the [ADEA]." *Dellmuth*, 491 U.S. at 230, 109 S. Ct. at 2402. But, as the Supreme Court stressed in *Dellmuth*, a permissible inference is not "the unequivocal declaration" that is required to show Congress's intent to exercise its powers of abrogation. *Id.*<sup>14</sup>

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<sup>14</sup> Some circuits have held that Congress did clearly express its intent to abrogate States' immunity in the ADEA. See, e.g., *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540 (10th Cir. 1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Davidson v. Board of Governors of State Colleges and Univs.*, 920 F.2d 441 (7th Cir. 1990); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983). I respect their views. These courts determined that the amendments adding States to the definition of "employer," read in connection with enforcement provisions permitting suits against violators of the ADEA, made it sufficiently clear that Congress intended to abrogate Eleventh Amendment immunity: Compare 29 U.S.C. § 623 (describing what conduct is unlawful) with 626(b), (c) (permitting civil suits "in any court of competent jurisdiction" for legal or equitable relief as may be appropriate to effectuate the purposes of the Act) and 630 (including States in the definition of "employer"). Although, to me, these courts are drawing a permissible inference from the statute, I cannot agree that the ADEA's language includes an unequivocal declaration of abrogation of States' immunity as required by the Constitution and the Supreme Court. It is just not "unmistakably clear" to me. See generally *Humenansky v. Board of Regents of the Univ. of*

I conclude that nothing in the ADEA indicates a truly clear intent by Congress to abrogate Eleventh Amendment immunity and, thus, States are entitled to immunity from suits by private citizens in federal court under the ADEA.

## II. *Americans With Disabilities Act*

In sharp contrast to the ADEA, the ADA does include a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment . . ." 42 U.S.C. § 12202.<sup>15</sup>

Thus, the only argument that Eleventh Amendment immunity still exists is that the ADA was not enacted pursuant to the Fourteenth Amendment. We are not persuaded by this argument.

Unlike the ADEA, it is plain that Congress was invoking its Fourteenth Amendment enforcement powers

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*Minnesota*, 958 F. Supp. 439 (D. Minn. 1997) (also concluding the ADEA lacks the necessary "unequivocal declaration" of intent to abrogate).

<sup>15</sup> I do not say that certain magic words must be used to abrogate immunity. I accept that Congress could unmistakably signal abrogation of immunity in a variety of ways, and we write no general rules today. See 42 U.S.C. § 2000e-5(f)(1) (where Title VII speaks of suits by aggrieved persons against "a government, governmental agency, or political subdivision" while discussing suits in federal district courts) and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 96 S. Ct. 2666, 2670, 49 L.Ed.2d 614 (1976) (concluding that Title VII abrogates Eleventh Amendment immunity). But when considering abrogation in both the ADEA and the ADA, I cannot help but see the clarity with which Congress addressed sovereign immunity in the ADA. Comparing the language of these two statutes further spotlights the ambiguous nature of the ADEA's treatment of Eleventh Amendment immunity.

when it enacted the ADA. *See* 42 U.S.C. § 12101(b) (“It is the purpose of this chapter . . . (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment. . . .”). Congress specifically found that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment.” 42 U.S.C. § 12101(a)(7).<sup>16</sup> We accept Congress’s analysis of the situation addressed by the ADA and agree with the courts that have addressed the issue: the ADA was properly enacted under Congress’s Fourteenth Amendment enforcement powers. *See, e.g., Amos v. Maryland Dep’t of Pub. Safety and Correctional Servs.*, 126 F.3d 589, 603 (4th Cir. 1997).<sup>17</sup>

### Conclusion

The Eleventh Amendment is an important part of the Constitution. It stands for the constitutional principle that State sovereign immunity limits the federal courts’ jurisdiction under Article III. As such, Congress must make an unmistakably clear statement of its intent before a federal court can accept that States have been stripped of their constitutionally granted sovereign

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<sup>16</sup> By the way, an express invocation of Fourteenth Amendment powers is not present in the ADEA. Nor did Congress make findings in the ADEA that persons of a particular age constitute a discrete and insular minority.

<sup>17</sup> In *Kimel*, the State presents one further issue: That should we determine the ADEA suit cannot be maintained against the State, we should remand with instructions to the district court to dismiss the supplemental state claim under the Florida Human Rights Act. That is the proper decision, and that claim is remanded to the district court with instructions that it be dismissed. *See Eubanks v. Gerwen*, 40 F.3d 1157, 1161-62 (11th Cir. 1994).



immunity. For me, the ADEA contains no unequivocally clear statement of such intent. The ADA does. And the ADA was enacted under the authority of the Fourteenth Amendment.

For the reasons stated in our combined opinions, we hold that the ADEA does not abrogate States' Eleventh Amendment immunity but that the ADA does do so. Therefore, in *Kimel*, we REVERSE and REMAND for dismissal. In *Dickson*, we AFFIRM in part and REVERSE in part and REMAND for further proceedings. In *MacPherson*, we AFFIRM the district court's decision.

HATCHETT, Chief Judge, concurring in judgment in part, dissenting in part:

I would hold that Congress effectively abrogated the states' sovereign immunity under the Eleventh Amendment of the United States Constitution in both the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. I therefore respectfully dissent from Part I of the Discussion in Judge Edmondson's opinion, holding that because states are entitled to sovereign immunity under the Eleventh Amendment, private citizens are precluded from bringing lawsuits against such entities in federal court under the ADEA.<sup>1</sup> I concur, however, in the result of Part II of Judge Edmondson's Discussion, concluding that the states are not entitled to Eleventh Amendment immunity from federal lawsuits under the ADA. I disagree with Judge Cox's analysis in its entirety and feel compelled to address, in particular, his assertion that the

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<sup>1</sup> For the sake of brevity, I will use the term "states" to refer to states and their agencies and instrumentalities.



ADEA and the ADA are not “valid enforcement” legislation pursuant to Congress’s power under Section 5 of the Fourteenth Amendment.<sup>2</sup>

Congress may exercise its power to abrogate the states’ Eleventh Amendment immunity if (1) it “has ‘unequivocally expresse[d] its intent to abrogate the immunity’”; and (2) it “has acted ‘pursuant to a valid exercise of power.’” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L.Ed.2d 252, 266 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 425, 88 L.Ed.2d 371 (1985)) (alteration in original). Congress must make its intent “unmistakably clear in the language of the statute.” *Seminole Tribe*, 517 U.S. at 54, 116 S. Ct. at 1122, 134 L.Ed.2d at 266 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S. Ct. 2397, 2400, 105 L.Ed.2d 181 (1989)). If the court finds that Congress clearly expressed its intent to abrogate the states’ immunity, the next inquiry is whether Congress enacted the legislation in question “pursuant to a constitutional provision granting [it] the power to abrogate[.]” *Seminole Tribe*, 517 U.S. at 58, 116 S. Ct. at 1124, 134 L.Ed.2d at 268.<sup>3</sup> A statute is “appropriate

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<sup>2</sup> Because Judge Cox provides the determining vote that states are entitled to sovereign immunity under the ADEA—albeit for a reason different from that of Judge Edmondson—my opinion with respect to the court’s ADEA analysis is a dissent. With regard to the ADA, however, I merely write separately to uphold the applicability of that statute to the states, as did Judge Edmondson.

<sup>3</sup> In *Seminole Tribe*, the Supreme Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989), and held that Congress has no authority to abrogate the states’ sovereign immunity when acting pursuant to the Commerce Clause, but can abrogate their immunity under Section 5 of the

legislation” to enforce the Equal Protection Clause of the Fourteenth Amendment if it “may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is ‘plainly adapted to that end’ and [if] it is not prohibited by but is consistent with ‘the letter and spirit of the constitution.’” *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir.) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966)) (alterations in original), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686).

### I. Congress's Intent to Abrogate the States' Immunity

#### A. *The ADEA*

The ADEA makes it unlawful for an “employer” “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s age[.]” 29 U.S.C. § 623(a)(1) (1994). In 1974, Congress amended the definition of “employer” to include “a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State,” and deleted text explicitly excluding such entities from that definition. 29 U.S.C. § 630(b)(2) & note (1994).<sup>4</sup> The ADEA explicitly provides that employers who violate the statute are subject to liability for legal and equitable relief. *See* 29

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Fourteenth Amendment. 517 U.S. at 58, 63, 116 S. Ct. at 1125, 1128, 134 L.Ed.2d at 268, 273.

<sup>4</sup> As a result, “employee” under the ADEA includes those persons who work for states and their agencies. *See* 29 U.S.C. § 630(f) (1994) (with some exceptions, “[t]he term ‘employee’ means an individual employed by any employer. . . .”).

U.S.C. § 626(b) (1994) (“In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter. . . .”); 29 U.S.C. § 626(c)(1) (1994).

I agree with the parties in *Kimel*—including the Florida Board of Regents—and with virtually every other court that has addressed the question, including all three district courts in the underlying cases, that Congress made an “unmistakably clear” statement of its intent to abrogate the states’ sovereign immunity in the ADEA. See *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1544 (10th Cir. 1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996); *Davidson v. Board of Governors of State Colleges & Univs. for W. Ill. Univ.*, 920 F.2d 441, 443 (7th Cir. 1990). “Unless Congress had said in so many words that it was abrogating the states’ sovereign immunity in age discrimination cases—and that degree of explicitness is not required—it could not have made its desire to override the states’ sovereign immunity clearer.” *Davidson*, 920 F.2d at 443 (internal citations omitted); see also *Edmondson, J.*, at 2398 n. 15 (“I do not say that certain magic words must be used to abrogate immunity. I accept that Congress could unmistakably signal abrogation of immunity in a variety of ways, and we write no general rules today.”). As the Third Circuit persuasively pointed out, “[t]he statute simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as ‘employers.’” *Blanciak*, 77 F.3d at 695; see also *Seminole Tribe*, 517 U.S. at 57, 116 S. Ct. at 1124, 134 L.Ed.2d at 266-67 (relying on the references to the “State” in the text of

the statute in question to conclude that such references “[made] it indubitable that Congress intended through the Act to abrogate the States’ sovereign immunity from suit”).<sup>5</sup>

I take issue with my colleague’s reliance on the facts that “[n]o reference to the Eleventh Amendment or to States’ sovereign immunity is included [in the ADEA,]” “[n]or is there, in one place, a plain, declaratory state-

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<sup>5</sup> I disagree that *Employees of the Dep’t of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 93 S. Ct. 1614, 36 L.Ed.2d 251 (1973), concluding that Congress did not clearly express its intent to abrogate the states’ immunity in enacting the 1966 amendments to the Fair Labor Standards Act (FLSA), calls into question Congress’s intent to abrogate the states’ immunity under the ADEA. In 1974, Congress specifically amended the FLSA to address the concerns of the *Employees* Court and to authorize lawsuits against the states in federal court. See *Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997) (stating that “we agree with the other courts of appeals that have examined the FLSA’s provisions and have concluded that the Act contains the necessary clear statement of congressional intent to abrogate state sovereign immunity”); *Hurd*, 109 F.3d at 1544 n. 3; *Reich v. New York*, 3 F.3d 581, 590, 591 (2d Cir. 1993) (stating that “Congress amended [the FLSA] with the intent that states and their political subdivisions would thereafter be subject to suit in federal court for violations of the FLSA[,]” and finding that “Congress has made its intent to abrogate the states’ sovereign immunity abundantly clear in the language of the FLSA, as amended in 1974 and 1985”), *cert. denied*, 510 U.S. 1163, 114 S. Ct. 1187, 127 L.Ed.2d 537 (1994), *overruled on other grounds*, *Close v. New York*, 125 F.3d 31, 38 (2d Cir. 1997) (“[W]e can no longer justify congressional abrogation under the Interstate Commerce Clause, and to the extent that *Reich* permits such abrogation, we hold *Reich* is no longer good law.”); *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir.) (*en banc*) (stating that Congress clearly intended to abrogate the states’ sovereign immunity in the 1974 amendments to the FLSA), *cert. denied*, 510 U.S. 946, 114 S. Ct. 386, 126 L.Ed.2d 335 (1993).

ment that States can be sued by individuals in federal court.” Edmondson, J., at 2395. Although Judge Edmondson states that we do not require Congress to use any “magic words” to abrogate effectively the states’ sovereign immunity, and that Congress may “unmistakably signal abrogation of immunity in a variety of ways,” I believe that his opinion, in essence, is requiring exactly that. Edmondson, J., at 2398 n. 15. If Congress has not sufficiently expressed its intent to abrogate the states’ immunity through including “States” in the definition of “employer” in the ADEA, after this decision, I cannot imagine in what other “variety of ways” Congress can signal the abrogation of the states’ immunity, other than through the use of “magic words.” The Court in *Seminole Tribe* did not require that Congress use any talismanic language to express its intent to abrogate, and could easily have done so. As I do not believe that *Seminole Tribe* requires Congress to use any particular words to express effectively its intent to abrogate the states’ immunity, and because I believe that Congress’s intent is clear in the language of the ADEA, I conclude that the first criterion of *Seminole Tribe* is satisfied. See *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S. Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18 (1983) (“[T]here is no doubt what the intent of Congress was: to extend the application of the ADEA to the States.”); *Gregory v. Ashcroft*, 501 U.S. 452, 467, 111 S. Ct. 2395, 2404, 115 L.Ed.2d 410 (1991) (“[The] ADEA plainly covers all state employees except those excluded by one of the exceptions.”); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 96 S. Ct. 2666, 2669, 49 L.Ed.2d 614 (1976) (concluding that Congress’s designation of states as parties in Title VII was sufficient to abrogate the states’ immunity).



### B. The ADA

The ADA presents an easier case under *Seminole Tribe's* "clear statement" standard, as both Judges Edmondson and Cox agree. See Edmondson, J., at 2398 n.15; Cox, J., at 2412-13. Within the statute's text, Congress explicitly provided:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202 (1994). Accordingly, I find that Congress "unequivocally expressed" its intent to abrogate the states' sovereign immunity in section 12202 of the ADA. See *Autio v. AFSCME, Local 3139*, No. 97-3145 (8th Cir. Apr. 9, 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 433 (5th Cir. 998) (finding Congress's intent to abrogate the states' immunity under the ADA "patently clear"); *Clark*, 123 F.3d at 1269-70.<sup>6</sup>

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<sup>6</sup> I must emphasize, however, that I do not conclude, or imply, that Congress is *required* to use any "magic words" to express effectively its intent to abrogate the states' immunity. I conclude only that Congress's intent under the ADA is clear.



## II. Congress's Power to Abrogate the States' Immunity

In addition to clearly expressing its intent, Congress also must have acted pursuant to its authority under Section 5 of the Fourteenth Amendment to abrogate successfully the states' Eleventh Amendment immunity. See *Seminole Tribe*, 517 U.S. at 58, 116 S. Ct. at 1124, 134 L.Ed.2d at 268. Judge Cox asserts that, regardless of whether Congress clearly expressed its intent to abrogate the states' immunity from lawsuits in federal court under both the ADEA and the ADA, Congress lacks the constitutional authority to do so under these statutes, relying on the Supreme Court's recent decision in *City of Boerne v. Flores*, — U.S. —, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997). In *Boerne*, the Supreme Court held that Congress exceeded its Section 5 authority in enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, through which Congress sought to reinstate a previous, more stringent standard of review for free exercise of religion claims.<sup>7</sup> The Court found that

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<sup>7</sup> In *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872, 883-87, 110 S. Ct. 1595, 1602-04, 108 L.Ed.2d 876 (1990), the Supreme Court declined to apply the balancing test for analyzing free exercise claims set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963), and held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *Boerne*, — U.S. at —, 117 S.Ct. at 2161, 138 L.Ed.2d at 635. Congress then enacted the RFRA, seeking "to restore the compelling interest test as set forth in *Sherbert* [,] . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened. . . ." 42 U.S.C. § 2000bb(b)(1) (1994). Thus, "[the] RFRA prohibit[ed] '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden

Congress was not *enforcing* rights under the Fourteenth Amendment, which it undeniably has the power to do, but was attempting to *create* rights that the Constitution did not guarantee. See *Boerne*, — U.S. at —, 117 S. Ct. at 2170, 138 L.Ed.2d at 646. In other words, Congress had impermissibly enacted “substantive” legislation. Judge Cox states that “*Boerne* and the Voting Rights Act cases teach us [that] [o]nly by respecting Supreme Court interpretations of the Fourteenth Amendment can Congress avoid impermissibly interpreting the Amendment itself.” Cox, J., at 2414. I interpret his analysis to limit, in an unallowable manner, the power of Congress and thus, disagree.

#### A. *The ADEA*

Judge Cox asserts that the ADEA was not a proper exercise of Congress’s Section 5 power under the *Boerne* analysis for two main reasons. First, he alleges that the statute confers more extensive rights to individuals than does the Equal Protection Clause of the Fourteenth Amendment. In essence, Judge Cox alleges that the ADEA puts “mandatory retirement ages” and “mandatory age limits” to a much more rigorous test than the Equal Protection Clause requires. Cox, J., at 1447. In addition, Judge Cox asserts that “Congress did not enact the ADEA as a proportional response to any widespread violation of the elderly’s constitutional rights[,]” because, among other reasons, the legislative history accompanying the 1974 amend-

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result[ed] from a rule of general applicability unless the government [could] demonstrate the burden ‘(1) [was] in furtherance of a compelling governmental interest; and (2)[was] the least restrictive means of furthering that compelling governmental interest.’” *Boerne*, — U.S. at —, 117 S. Ct. at 2162, 138 L.Ed.2d at 636 (quoting 42 U.S.C. § 2000bb-1).

ment to the ADEA did not mention the Constitution or constitutional violations. Cox, J., at 2415, 2416-17.

To the contrary, like many other circuit courts, I conclude that the ADEA falls squarely within the enforcement power that Section 5 of the Fourteenth Amendment confers on Congress. See *Hurd*, 109 F.3d at 1545-46; *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 699-700 (1st Cir. 1983); *EEOC v. Elrod*, 674 F.2d 601, 608-09 (7th Cir. 1982); *Arritt v. Grisell*, 567 F.2d 1267, 1270-71 (4th Cir. 1977). Congress enacted the ADEA to remedy and prevent what it found to be a pervasive problem of arbitrary discrimination against older workers. Such protection is at the core of the Fourteenth Amendment's guarantee of equal protection under the law. Even though Congress arguably has gone further in proscribing government employment practices that discriminate on the basis of age than have the courts in adjudicating claims under the Fourteenth Amendment, this merely reflects the differing roles of Congress and the courts.

1. *Congress enacted the ADEA to "enforce" rights under the Equal Protection Clause of the Fourteenth Amendment.*

In *Boerne*, Congress legislated a constitutional standard of review for the judiciary. Contrary to Judge Cox's assertions, I do not find this to be the case under the ADEA. In general, the Equal Protection Clause proscribes states from treating similarly situated persons within their jurisdictions differently and assures that governments will differentiate between their citizens only upon reasonable grounds that have a relationship to the desired goals. See, e.g., *Romer v. Evans*, 517 U.S. 620, 630-32, 116 S. Ct. 1620, 1627-28, 134 L.Ed.2d 855, 865-67 (1996); *Nordlinger v. Hahn*, 505 U.S. 1, 10,

112 S. Ct. 2326, 2331, 120 L.Ed.2d 1 (1992); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 105 S. Ct. 3249, 3257, 87 L.Ed.2d 313 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). Although age is not a "suspect" or quasi-suspect classification deserving of close judicial scrutiny under the Equal Protection Clause, the Fourteenth Amendment's equal protection guarantees are not limited solely to members of a few protected groups.<sup>8</sup> See, e.g., *Cleburne*, 473 U.S. at 447, 105 S. Ct. at 3258 ("[T]he [disabled], like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law."). *Every* person has a right to be free from government classifications based on arbitrary or irrational criteria, and Congress's power is not limited to "the protection of those classes found by the Court to deserve 'special protection' under the Constitution." *Clark*, 123 F.3d at 1270-71. *But cf. Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th Cir. 1996) (stating that the court will not "regard" a legislation that does not affect a judicially-recognized "specially protected" class, as an enactment "to enforce the Equal Protection Clause" unless Congress explicitly stated that it is enforcing that clause), *amended on other grounds*, 107 F.3d 358 (1997).

Additionally, Congress has not exceeded its authority to enforce the Equal Protection Clause simply because the ADEA may impose liability involving distinctions

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<sup>8</sup> Under the Equal Protection Clause, arbitrary state action can burden the rights of older individuals on the basis of age if the action passes the rational basis test, i.e., it is rationally related to a legitimate government interest. See *Gregory*, 501 U.S. at 470-71, 111 S. Ct. at 2405-06.

based on age that a court would not find to be “irrational” under that clause. It is undisputed that Congress’s power to enforce the rights to equal protection of the law under Section 5 is not unlimited. Congress cannot “decree the substance of the Fourteenth Amendment’s restrictions on the States[,]” or alter “what the right[s][are].” *Boerne*, — U.S. at —, 117 S. Ct. at 2164, 138 L.Ed.2d at 638. It has long been established, however, that “[l]egislation which deters and remedies constitutional violations can fall within the sweep of Congress’ enforcement power *even if in the process it prohibits conduct which is not itself unconstitutional* and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” *Boerne*, — U.S. at —, 117 S. Ct. at 2163, 138 L.Ed.2d at 637 (quoting *Fitzpatrick*, 427 U.S. at 455, 96 S. Ct. at 2670) (emphasis added). The *Boerne* Court cited, as an example, its upholding the suspension of various voting requirements, such as literacy tests, under Congress’s parallel power to enforce the Fifteenth Amendment to combat racial discrimination in voting “despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 79 S. Ct. 985, 3 L.Ed.2d 1072 (1959).” *Boerne*, — U.S. at —, 117 S. Ct. at 2163, 138 L.Ed.2d at 637; *see also Scott v. City of Anniston*, 597 F.2d 897, 899, 900 (5th Cir. 1979) (“The fourteenth amendment empowers Congress to enact appropriate legislation establishing more exacting requirements than those minimum safeguards provided in the amendment[,]” as long as Congress does so “to carry out the purpose of [the] amendment[ ].”), *cert. denied*, 446 U.S. 917, 100 S. Ct. 1850, 64 L.Ed.2d 271 (1980). Courts must accord Congress “wide latitude” in determining where to draw the line between measures that prevent or



remedy unconstitutional actions and those that make substantive changes in the governing law. *Boerne*, — U.S. at —, 117 S. Ct. at 2163, 138 L.Ed.2d at 638.

Thus, it is clear that Congress does not merely have to “rubber stamp” the constitutional violations that the Supreme Court has already found to exist; nor does it have to legislate to remedy only that conduct that the Court would find unconstitutional, even though the Court has not yet so ruled. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 2567, 49 L.Ed.2d 520 (1976) (stating in dicta that the rational-basis inquiry “reflect[s] the Court’s awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one”).<sup>9</sup> Such an interpretation would essentially render meaningless Congress’s power to enforce the Fourteenth Amendment, which is separate and distinct from the power of the judiciary to interpret the Constitution. See *Katzenbach*, 384 U.S. at 648-49, 86 S. Ct. at 1721-22.

In *Katzenbach v. Morgan*, the Supreme Court rejected the state’s argument that section 4(e) of the Voting Rights Act could not be sustained as appropriate legislation to enforce the Equal Protection Clause unless the courts decided that the clause forbade that section’s English literacy requirement. 384 U.S. at 648-50, 86 S. Ct. at 1721-22. The Court stated:

A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining

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<sup>9</sup> At issue in *Murgia* was the constitutionality under the Equal Protection Clause of a state statute mandating a retirement age for state police officers. See 427 U.S. at 308, 96 S. Ct. at 2563.



the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the “majestic generalities” of § 1 of the Amendment.

*Katzenbach*, 384 U.S. at 648-49, 86 S. Ct. at 1721-22 (footnote omitted). I decline to read such a limitation of Congress’s power into the *Boerne* decision, and find any assertion that the ADEA may not reach practices that are not themselves unconstitutional simply to be wrong.

2. *The ADEA is an appropriate, proportional remedial measure to address age discrimination.*

In order for the courts to consider legislation to be “remedial,” and not substantive, in nature, “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” must exist. *Boerne*, — U.S. at —, 117 S. Ct. at 2164, 138 L.Ed.2d at 638. After reviewing the text and legislative history of the ADEA and its amendments, I conclude that Congress, in addressing arbitrary age discrimination in employment, satisfied this requirement. *See generally Wyoming*, 460 U.S. at 229-33, 103 S. Ct. at 1056-58 (discussing the ADEA’s legislative history); *Elrod*, 674 F.2d at 604-07 (same).

The preamble to the ADEA provides Congress’s findings regarding, among other things, “arbitrary age limits regardless of potential for job performance [that] has become a common practice,” and “arbitrary discrimination in employment because of age,” and states

that one of the Act's purposes is to prohibit such discrimination. 29 U.S.C. § 621 (1994). In the 1950s, Congress began its endeavors to prohibit arbitrary age discrimination. *See Wyoming*, 460 U.S. at 229, 103 S. Ct. at 1056. During floor debates concerning the enactment of Title VII of the Civil Rights Act of 1964, amendments to include age along with Title VII's protected classes were rejected "in part on the basis that Congress did not yet have enough information to make a considered judgment about the nature of age discrimination[.]" *Wyoming*, 460 U.S. at 229, 103 S. Ct. at 1056 (citing 110 Cong. Rec. 2596-99, 9911-13, 13490-92 (1964)). Congress thus directed the Secretary of Labor (Secretary) to conduct a "full and complete" study on age discrimination in employment. *Wyoming*, 460 U.S. at 230, 103 S. Ct. at 1057. The Secretary issued the report about a year later, finding, among other things, that (1) employment age discrimination was generally based on unsupported stereotypes and was often defended on pretextual grounds; and (2) the empirical evidence showed that arbitrary age limits were unfounded overall, as older workers, on average, performed as well as younger workers. *Wyoming*, 460 U.S. at 230-31, 103 S. Ct. at 1057-58. Thereafter, committees in the Senate and the House of Representatives conducted extensive hearings on proposed legislation prohibiting such discrimination, and the Secretary's findings "were confirmed throughout the extensive fact-finding undertaken by the Executive Branch and Congress." *Wyoming*, 460 U.S. at 230-31, 103 S. Ct. at 1057-58.

In March 1972, around the same time that Congress considered and passed amendments under Section 5 extending Title VII's application to state and local

government employees, Senator Bentsen first introduced legislation to extend the ADEA to government employees. *Elrod*, 674 F.2d at 604 (citing 118 Cong. Rec. 7745 (1972), and Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103). After Senator Bentsen again presented the proposed amendment in May 1972, arguing that Title VII's underlying principles were "directly applicable" to the ADEA, the Senate voted unanimously in favor of the ADEA amendment. *Elrod*, 674 F.2d at 604-05 (citing 118 Cong. Rec. 15894, 15895 (1972)). The amendment, however, initially failed to pass House-Senate conference committees. *Elrod*, 674 F.2d at 605. Although little legislative history exists concerning the 1974 amendment to the ADEA, and Congress made no mention of a specific constitutional provision, both the House and the Senate cited President Nixon's remarks in 1972 to indicate the congressional purpose of the amendment:

Discrimination based on age—what some people call "age-ism"—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation[ ] the contribution they could make if they were working.

*Elrod*, 674 F.2d at 605 (quoting S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974), and H.R. Rep. No. 93-913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.C.C.A.N. 2811,

2849).<sup>10</sup> In addition, Senator Bentsen commented that “[t]he passage of [the ADEA amendment] insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector.” *Elrod*, 674 F.2d at 605 (quoting 120 Cong. Rec. 8768 (1974)).<sup>11</sup>

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<sup>10</sup> The amendments to the FLSA that, among other things, extended that statute to federal, state and local government employees—and with which Congress passed the 1974 ADEA amendment—overshadowed the ADEA. The House and Senate considered the ADEA amendment to be “a logical extension of the Committee’s decision to extend FLSA coverage to Federal, State, and local government employees.” *Elrod*, 674 F.2d at 605 (internal quotation marks omitted). Even in light of this and the Supreme Court’s concluding that Congress passed the ADEA pursuant to its power under the Commerce Clause, my determination that Congress also was exercising its power under Section 5 of the Fourteenth Amendment in enacting the ADEA is not precluded. See *Wyoming*, 460 U.S. at 243, 103 S.Ct. at 1064 (“The extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress’ powers under the Commerce Clause. We need not decide whether it could *also* be upheld as an exercise of Congress’ powers under § 5 of the Fourteenth Amendment.”) (emphasis added); *Hurd*, 109 F.3d at 1546 (concluding, after *Wyoming*, that “Congress acted pursuant to its powers under the Fourteenth Amendment when it applied the ADEA to the states”); *Ramirez*, 715 F.2d at 700 (holding post *Wyoming* that Congress adopted the 1974 ADEA amendment pursuant to its Section 5 power).

<sup>11</sup> In addition, included in the legislative history of the 1978 ADEA amendments is a statement from Representative Paul Findley further supporting the view that Congress’s legislation in the ADEA was part of its general policy to ensure equal employment opportunities. Representative Findley stated that “depriving older and still capable Americans of jobs [does not] make any more sense than discriminating in employment against blacks, women, or religious or ethnic minorities.” *Elrod*, 674 F.2d at 606

In light of the above, I conclude that the ADEA qualifies as a valid enforcement provision under Congress's Section 5 power. The text and history of the ADEA demonstrate a congressional focus, including extensive factfinding on arbitrary age discrimination, and its resulting harm, in the employment practices of private and public employers—discrimination that had become a “common practice” and was often unrelated to legitimate employment goals. *See* 29 U.S.C. § 621 (1994). “[I]t is clear that the purpose of the [1974 amendment to the ADEA] was to prohibit arbitrary, discriminatory government conduct that is the very essence of the guarantee of ‘equal protection of the laws’ of the Fourteenth Amendment.” *Elrod*, 674 F.2d at 604; *see also Ramirez*, 715 F.2d at 699 (stating that Congress extended ADEA coverage “to shield public employees from the invidious effects of age-based discrimination. The 1974 amendment, like the ADEA itself, ‘is aimed at irrational, unjustified employment decisions based upon assumptions about the relationship between age and ability which classify older workers as incapable of effective job performance.’”) (quoting *Elrod*, 674 F.2d at 605).<sup>12</sup>

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(quoting H.R. Rep. No. 95-527, Part I, 95th Cong., 1st Sess., reprinted in [1978] 753 Gov't Empl. Rel. Rep. (BNA) 101, 103).

<sup>12</sup> The fact that employers can defend their age-based classifications on the grounds that such classifications are related to a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business” or are “based on reasonable factors other than age,” supports the proposition that the ADEA only targets arbitrary age discrimination, rather than every employment decision that is based on or related to age. 29 U.S.C. § 623(f)(1) (1994). Even age-based employment distinctions under disparate impact claims generally do not violate the ADEA if the distinctions serve the “legitimate employment goals



### *B. The ADA*

With respect to the ADA, Judge Cox states that the statute is not valid enforcement legislation for the same reasons that he rejected the ADEA. First, he asserts that because the disabled are not a suspect or quasi-suspect class, and thus enjoy no special rights under the Equal Protection Clause, the ADA provides them with greater protection than does the Equal Protection Clause. His second reason is that the ADA "was unaccompanied by any finding that widespread violation of the disabled's constitutional rights required the creation of prophylactic remedies[.]" and states that "[a]ltruistic and economic concerns motivated [the ADA]—not defense of the Constitution." Cox, J., at 2417-18. For reasons similar to my analysis of the ADEA, I disagree.

As an initial matter, I acknowledge that, unlike in the ADEA, Congress explicitly invoked its enforcement power under the Fourteenth Amendment in the ADA. See 42 U.S.C. § 12101(b)(4) (1994) ("It is the purpose of [the ADA] . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."). I emphasize, however, that, similar to Congress's expression of its intent, Congress is not required to use any magic words to invoke its authority to enforce the Fourteenth Amendment under Section 5 before abrogating the states' immunity. See *supra* p. 1445; see also *Clark*, 123 F.3d

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of the employer." *MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (11th Cir. 1991) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659, 109 S. Ct. 2115, 2125, 104 L.Ed.2d 733 (1989)).



at 1271 ("Although 'the constitutionality of action taken by Congress does not depend on recitals of power which it undertakes to exercise,' we give great deference to congressional statements.") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S. Ct. 421, 424, 92 L.Ed. 596 (1948)). In *EEOC v. Wyoming*, the Supreme Court rejected that very suggestion, and stated:

It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," see, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 476-78, 100 S. Ct. 2758, 2773-74, 65 L.Ed.2d 902 (1980) (Burger, C.J.), for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S. Ct. 421, 424, 92 L.Ed. 596 (1948).

460 U.S. at 243 n. 18, 103 S. Ct. at 1064 n. 18. The question, therefore, is not whether Congress explicitly relied on the Fourteenth Amendment when it enacted the ADA, but whether the statute is within Congress's authority under that amendment. See *Ramirez*, 715 F.2d at 698 ("The omission of any ritualistic incantation of powers by the Congress is not determinative, for there is no requirement that the statute incorporate buzz words . . . "); *Elrod*, 674 F.2d at 608 ("[T]he test of whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment requires no talismanic intoning of the amendment. Rather, the inquiry is whether

the *objectives* of the legislation are within Congress' power under the amendment.") (internal citation and footnote omitted). That being said, I now turn to the substantive analysis of the ADA.

First, I do not agree with Judge Cox's equal protection argument concerning the ADA for the same reasons I declined to accept this argument with respect to the ADEA. Although, like older individuals, the disabled are not a suspect or quasi-suspect class—and therefore are not entitled to the higher level of judicial scrutiny under the Equal Protection Clause that courts accord state action affecting such classes—the disabled are still entitled to the equal protection of the law against arbitrary discrimination, as is every person. See *Cleburne*, 473 U.S. at 446, 105 S. Ct. at 3257 ("Our refusal to recognize the [disabled] as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination."). Like the Ninth Circuit, I find no authority for the idea that "the Court's choice of a level of scrutiny for purposes of judicial review should be the boundary of the legislative power under the Fourteenth Amendment[.]" *Clark*, 123 F.3d at 1271. I therefore conclude—especially in light of the congressional history of the ADA as discussed below—that Congress did not exceed its authority in enacting that statute simply because the ADA may impose liability in situations that the courts would not find to violate judicial standards under the Equal Protection Clause. I consider the ADA to be legislation that falls within the sweep of Congress' enforcement power to "prohibit[ ] conduct which is not itself unconstitutional." *Boerne*, — U.S. at —, 117 S. Ct. at 2163, 138 L.Ed.2d at 637.

Additionally, I disagree with the assertion that Congress was not concerned with constitutional violations

when it enacted the ADA, and thus that the statute is not valid enforcement legislation under its Section 5 power. The ADA is “appropriate legislation” to enforce the Equal Protection Clause, as it may be regarded as an enactment to enforce that clause, is plainly adapted to that end and “is not prohibited by but is consistent with the letter and spirit of the [C]onstitution.” *Clark*, 123 F.3d at 1270 (internal quotation marks omitted); see also *Autio v. AFSCME, Local 3139*, — F.3d —, No. 97-3145 (8th Cir. Apr. 9, 1998) (concluding that Congress validly enacted the ADA to enforce the Equal Protection Clause through the exercise of its Section 5 power); *Coolbaugh*, 136 F.3d at 438 (“[T]he ADA represents Congress’ considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled.”).

Congress considered an abundance of evidence and made extensive findings in the ADA concerning the extent of the discrimination against, and resulting harm to, the disabled to support the statute’s enactment. See *Coolbaugh*, 136 F.3d at 436-37 (stating that both the House and the Senate cited seven substantive studies or reports and “a wealth of testimonial and anecdotal evidence from a spectrum of parties to support the finding of serious and pervasive discrimination”). In particular, it found that:

- (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
- (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination

against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities; [and]

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally[.]

42 U.S.C. § 12101(a) (1994); *Coolbaugh*, 136 F.3d at 435. Congress also observed that:

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a) (1994); *Coolbaugh*, 136 F.3d at 435 n. 3.<sup>13</sup> As the Supreme Court has stated, "It is for

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<sup>13</sup> Congress's detailed findings in the ADA are one ground on which to distinguish the underlying *Dickson* case from *Boerne*, in which the Court noted that Congress made no findings concerning widespread unconstitutional discrimination against religious persons to support the RFRA. See *Boerne*, — U.S. at — — —, 117 S. Ct. at 2169-70, 138 L.Ed.2d at 645-46; see also *Coolbaugh*, 136 F.3d at 438. The Court, however, went on to state that



Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Boerne*, — U.S. at —, 117 S. Ct. at 2171, 138 L.Ed.2d at 649 (quoting *Katzenbach*, 384 U.S. at 651, 86 S. Ct. at 1723) (alteration in original); *Coolbaugh*, 136 F.3d at 436 ("Deference to the judgment of Congress is particularly appropriate in this case, because in *Cleburne*, the Court identified Congress as the ideal governmental branch to make findings and decisions regarding the legal treatment of the disabled.") (citing 473 U.S. at 442-43, 105 S. Ct. at 3255-56); *Cleburne*, 473 U.S. at 442-43, 105 S. Ct. at 3255-56 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."). In light of these explicit congressional findings, I find it abundantly clear that Congress was concerned about the "defense of the Constitution" in enacting the ADA.

Overall, viewing the remedial measures in light of the evils presented, both the ADEA and the ADA were valid enactments of Congress to redress discrimination pursuant to its enforcement power under Section 5 of the Fourteenth Amendment. Additionally, because the dangers that the Court found inherent in the RFRA are not present in the ADEA and the ADA, I find *Boerne*

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"[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" *Boerne*, — U.S. at —, 117 S. Ct. at 2170, 138 L.Ed.2d at 646 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207, 91 S. Ct. 260, 306, 27 L.Ed.2d 272 (1970) (Harlan, J.)).

distinguishable. *Boerne*, — U.S. at —, 117 S. Ct. at 2170, 138 L.Ed.2d at 647 (stating that “[t]he reach and scope of [the] RFRA distinguish it from other measures passed under Congress’ enforcement power. . . .”). First, the ADEA and the ADA did not pose the same threat as the RFRA to the separation of powers principles, because “Congress included no language attempting to upset the balance of powers and usurp the Court’s function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court.” *Coolbaugh*, 136 F.3d at 438.<sup>14</sup> Second, unlike the ADEA and the ADA, the RFRA “prohibit[ed] official actions of almost every description and regardless of subject matter.” *Boerne*, — U.S. at —, 117 S. Ct. at 2170, 138 L.Ed.2d at 646. Neither the ADEA nor the ADA “is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *Boerne*, — U.S. at —, 117 S. Ct. at 2170, 138 L.Ed.2d at 646; *see also Coolbaugh*, 136 F.3d at 437 (“Congress’ scheme in the ADA to provide a remedy to the disabled who suffer discrimination and to prevent such discrimination is not so draconian or overly sweeping to be considered disproportionate to the serious threat of discrimination Congress perceived.”); *Clark*, 123 F.3d at 1270. Finally, the standard of review set forth in the RFRA was “the most demanding test known to constitutional law [,]” and imposed an additional requirement on state action that the previous judicial standard that Congress attempted to reinstate, *i.e.*, that the state action be the least restrictive means

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<sup>14</sup> Although the *Coolbaugh* court was specifically referring to the ADA, I find the same to be true of the ADEA.

of fulfilling the state's interest, had not imposed. *See Boerne*, — U.S. at —, 117 S. Ct. at 2171, 138 L.Ed.2d at 648. The same simply cannot be said for analysis of claims under the ADEA and ADA.

In general,

[t]he extension of the ADEA [and the ADA] to the states insures uniformity and greater compliance with [those statutes]. It also eliminates the anomaly that government is not bound by public policy. As Justice Brennan remarked in a related context: "How 'uniquely amiss' it would be, therefore, if the government itself—the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct—were permitted to disavow liability for the injury it has begotten."

*Elrod*, 674 F.2d at 612 (quoting *Owen v. City of Independence*, 445 U.S. 622, 651, 100 S. Ct. 1398, 1415, 63 L.Ed.2d 673 (1980)).

### III. CONCLUSION

For the foregoing reasons, I would hold that Congress effectively abrogated the states' sovereign immunity in enacting the ADEA as well as the ADA. Therefore, I would affirm the district courts' decisions in *Kimel* and *Dickson*, and would reverse the district court's decision in *MacPherson*. Accordingly, I concur only in the judgment of Part II of Judge Edmondson's opinion and otherwise respectfully dissent.

COX, Circuit Judge, concurring in part and dissenting in part:

Congress lacks the constitutional authority to abrogate the states' Eleventh Amendment immunity to suit in federal court on claims under either the Age Discrimination in Employment Act or the Americans with Disabilities Act. For that reason, I concur in Judge Edmondson's conclusion that the states are immune to ADEA suits. I respectfully dissent, however, from the holding that the states do not enjoy the same immunity from ADA suits.

### I. Background

Each of the plaintiffs in these three consolidated appeals sued a state instrumentality, asserting claims under the ADEA or ADA. In each case, the state raised a defense of Eleventh Amendment immunity to suit on such claims. In *MacPherson v. University of Montevallo*, the district court granted the University's motion to dismiss, concluding that Congress has not, by enacting the ADEA, abrogated the states' Eleventh Amendment immunity. The district court hearing *Kimmel v. Florida Board of Regents*, on the other hand, denied a similar motion by the Florida Board of Regents. And the Florida Department of Corrections likewise unsuccessfully sought dismissal of ADA and ADEA claims against it in *Dickson v. Florida Department of Corrections*.

McPherson and the state entities in *Dickson* and *Kimmel* have appealed the respective rulings. The appeals present two related issues: has Congress abrogated the states' Eleventh Amendment immunity to suits under (1) the ADEA or (2) the ADA? This court's review of such issues of law is de novo. See *Seminole Tribe v.*

*Florida*, 11 F.3d 1016, 1021 (11th Cir. 1994), *aff'd*, 517 U.S. 44, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996).

## II. Discussion

### A. Abrogation

The judicial power of the United States does not extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of that or another state. See U.S. Const. amend. XI; *Hans v. Louisiana*, 134 U.S. 1, 14-15, 10 S. Ct. 504, 507, 33 L.Ed. 842 (1890). Congress may abrogate the states' immunity if first it "unequivocally expresse[s] its intent to abrogate the immunity," and second it acts "pursuant to a valid exercise of power." See *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1123, 134 L.Ed.2d 252 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426, 88 L.Ed.2d 371 (1985)).

Congress has provided a clear statement of intent to abrogate in the ADA. The Act provides that "[a] State shall not be immune under the eleventh amendment. . . ." 42 U.S.C. § 12202. As Judge Edmondson points out, the ADEA presents a harder question. On one hand, Congress identified state employees as potential plaintiffs and the states as potential defendants. On the other hand, Congress never uses the words "Eleventh Amendment" or "immunity." See [Judge Edmondson's Opinion, at 2393-99]. Notwithstanding the omission of these words, the explicit designation of states as potential defendants has led four circuit courts to conclude that Congress did clearly intend to abrogate the states' immunity to ADEA suits. *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1544 (10th Cir. 1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996) (dictum); *Davidson v. Board of Governors of State*



*Colleges & Univs.*, 920 F.2d 441, 443 (7th Cir. 1990); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 698 (1st Cir. 1983). The Supreme Court has agreed with this reasoning in other contexts. See *Seminole Tribe*, 517 U.S. at 56, 116 S. Ct. at 1124 (Indian Gaming Act's designation of states as parties sufficient); *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S. Ct. 2397, 2403, 105 L.Ed.2d 181 (1989) (Scalia, J., concurring) ("I join the opinion of [four other Justices of] the Court, with the understanding that its reasoning does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment."); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 96 S.Ct. 2666, 2670, 49 L.Ed.2d 614 (1976) (Title VII's designation of states as parties enough).

Fortunately, the thorny issue of Congress's intent need not be resolved here. Whether or not Congress clearly expressed its intent, it lacks the power to abrogate the states' immunity to suit in federal court in actions under the ADEA or the ADA. The Supreme Court has identified only one constitutional grant of power, § 5 of the Fourteenth Amendment, under which Congress may defeat the states' immunity. See *Seminole Tribe*, 517 U.S. at 58-59, 116 S.Ct. at 1125-28. The Court has recently revisited the limits on that power.

#### B. *Power to Abrogate*: *City of Boerne v. Flores*

In *City of Boerne v. Flores*, — U.S. —, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), the Court struck down the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb to 2000bb-4. The RFRA prohibited all governmental entities from "substantially burden-

ing” the exercise of religion unless they had a compelling interest for doing so and had employed the “least restrictive means” for furthering that interest. *Id.* § 2000bb-1(a), (b). With the RFRA’s stringent rule, Congress sought to resurrect the First and Fourteenth Amendment rights that Congress believed the Supreme Court had extinguished in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990). A Roman Catholic church in Boerne, Texas, invoked the Act when the town denied the church a permit to add additional worship space. *Boerne*, — U.S. at —, 117 S. Ct. at 2160. The district court held that the RFRA was beyond Congress’s Fourteenth Amendment powers, and the Supreme Court agreed.

The Court rested this conclusion on a basic principle: The Court is the unique, ultimate authority on the scope of Fourteenth Amendment rights. *See id.* at —, 117 S. Ct. at 2166. Thus, Congress may not define or declare these rights. *See id.* Rather, Congress may only enforce the Fourteenth Amendment rights the Supreme Court has recognized. *See id.* at —, 117 S. Ct. at 2164. Enforcement can include creating some rights beyond those clearly guaranteed by the Constitution. *See id.* at —, 117 S. Ct. at 2163. But, the Court concluded, such extensions of rights must be proportional to an unconstitutional injury that Congress is seeking to remedy. *See id.* at —, 117 S. Ct. at 2164.

The RFRA was not such a proportional response to any injury to constitutional rights. The Court identified two circumstances that showed the RFRA to be “substantive” legislation, as the Court called it, rather than enforcement of Fourteenth Amendment guarantees. First, Congress enacted the RFRA without findings (or

even hearings) on the existence of widespread violations of any constitutional right that the Supreme Court has recognized. *Id.* —, 117 S. Ct. at 2169. Second, rather than simply remedying any constitutional violations, the RFRA created rights that far exceeded any the Supreme Court has read the First Amendment to provide. *See id.* at —, 117 S. Ct. at 2170. Under *Smith*, generally applicable statutes that incidentally burden religion are permissible, see 494 U.S. at 878-79, 110 S. Ct. at 1600; the RFRA could not be enforcing any First and Fourteenth Amendment right to be free from incidental burdens on religious practice. *See Boerne*, — U.S. at —, 117 S. Ct. at 2171. Therefore, Congress did not have power under the Fourteenth Amendment to enact the statute.

*Boerne* thus sets the RFRA outside § 5's boundary. Two earlier cases, both concerning the Voting Rights Act of 1965, exemplify proper exercise of Congress's § 5 power. The first case is *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L.Ed.2d 769 (1966), which rejected a broad attack on most of the geographically restricted provisions of the Voting Rights Act. The second is *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966), which upheld a provision of the Act that invalidated New York's English-literacy voter-qualification rule. Of the two cases, *Morgan* appears to attribute the broadest powers to Congress, arguably recognizing a congressional power not only to effectuate Supreme Court-identified rights but also to find Fourteenth Amendment rights not yet identified by the Supreme Court. *See Morgan*, 384 U.S. at 650-51, 86 S. Ct. at 1723-24.

The *Boerne* Court dismissed the language in *Morgan* that suggests that Congress has broad powers both to

interpret the Fourteenth Amendment and effectuate Fourteenth Amendment rights, *Boerne*, — U.S. at —, 117 S.Ct. at 2168, but the Court reaffirmed its holdings in these Voting Rights Act cases. *Id.* at — - —, 117 S. Ct. at 2166-68. The differences between the circumstances underlying the Voting Rights Act and those leading to the RFRA are, after all, striking. Before passing the Voting Rights Act, Congress thoroughly documented a history of obvious Fifteenth Amendment violations, and the legislative history indicates that the Act's primary purpose was to vindicate the Fifteenth Amendment rights that Southern voting laws and practices were defeating. *Morgan*, 384 U.S. at 648, 86 S. Ct. at 1722; *South Carolina*, 383 U.S. at 313, 328, 86 S. Ct. at 811, 818-19. Congress took measures tailored to remedy the constitutional violations: the measures were limited to prohibiting patently unconstitutional conduct and establishing policing mechanisms for future violations; they applied only to states where Congress found constitutional violations were the most common; and the Act contained "bailout" provisions to relieve jurisdictions that complied with the Constitution from the Act's restraints. See *Boerne*, — U.S. at —, 117 S. Ct. at 2170. The Voting Rights Act effectuated established constitutional guarantees.

*Boerne* and the Voting Rights Act cases teach us these lessons: Only by respecting Supreme Court interpretations of the Fourteenth Amendment can Congress avoid impermissibly interpreting the Amendment itself. See *Boerne*, — U.S. at — - —, 117 S. Ct. at 2166-67. Congress nonetheless may, if circumstances warrant, tweak procedures, find certain facts to be presumptively true, and deem certain conduct presumptively unconstitutional in light of Supreme Court

interpretation. See *South Carolina*, 383 U.S. at 328, 333, 335, 86 S. Ct. at 818, 821-22. Thus, legislation enacted pursuant to § 5 must hew to the contours of Supreme Court-defined Fourteenth Amendment rights unless the legislation is a proportional response to a documented pattern of constitutional violation.

### C. *Is the ADEA Enforcement Legislation?*

The ADEA does not qualify under *Boerne*'s rule as a proper exercise of Congress's § 5 power.<sup>1</sup> First, the ADEA confers rights far more extensive than those the Fourteenth Amendment provides. Second, Congress did not enact the ADEA as a proportional response to any widespread violation of the elderly's constitutional rights.

The Fourteenth Amendment right that the ADEA arguably guards is that of equal protection. The Equal Protection Clause generally prohibits states from treating similarly situated citizens differently. See *Romer v. Evans*, 517 U.S. 620, 621, 116 S. Ct. 1620, 1623, 134 L.Ed.2d 855 (1996). But the degree of protection varies according to the class of person discriminated against or the interest that the classification

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<sup>1</sup> There is pre-*Boerne* law in other circuits finding the exercise to be proper. See *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 699 (1st Cir. 1983); *E.E.O.C. v. Elrod*, 674 F.2d 601, 605 (7th Cir. 1982); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977). They share a similar analysis, which has two flaws. First, it rests on broad language in *Katzenbach v. Morgan*, 384 U.S. at 650-51, 86 S. Ct. at 1723-24, that *Boerne* has since rejected, — U.S. at —, 117 S.Ct. at 2168. Second, it treats all "discrimination" as equally impermissible under the Equal Protection Clause and therefore within Congress's power to remedy. That is simply not true. Race and age discrimination, for example, are subject to very different degrees of scrutiny.



compromises. See *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42, 105 S. Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). State action that confers different rights, or imposes different duties, on persons belonging to nonsuspect classes is permissible if the action has a rational relation to a legitimate governmental interest. See *Romer*, 517 U.S. at 630, 116 S. Ct. at 1627.

The elderly are not a suspect class, and state action that disadvantages them is constitutional if it passes this rational basis test. See *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S. Ct. 2395, 2406, 115 L.Ed.2d 410 (1991); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14, 96 S. Ct. 2562, 2567, 49 L.Ed.2d 520 (1976). Under this test, the Supreme Court will not overturn a state measure "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." *Gregory*, 501 U.S. at 471, 111 S. Ct. at 2406 (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 942-43, 59 L.Ed.2d 171 (1979)) (alterations in original). And a state does not violate the Equal Protection Clause "merely because the classifications made by the laws are imperfect." *Id.* at 473, 111 S.Ct. at 2407 (quoting *Murgia*, 427 U.S. at 316, 96 S. Ct. at 2568). Moreover, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111, 99 S. Ct. at 949.

The Supreme Court has put three mandatory retirement age policies to this test, and all have passed.

*Gregory*, 501 U.S. at 452, 111 S. Ct. at 2395 (policy required judges to retire at 70); *Vance*, 440 U.S. at 93, 99 S. Ct. at 939 (policy required foreign service officers to retire at 60); *Murgia*, 427 U.S. at 307, 96 S. Ct. at 2562 (policy required police officers to retire at 50). In each case, the policymaker's perception that mental acuity and physical stamina decline with age was rational basis enough to support the line between those under the retirement age and those over it. *Gregory*, 501 U.S. at 472, 111 S. Ct. at 2407; *Vance*, 440 U.S. at 98-109, 99 S. Ct. at 943-49; *Murgia*, 427 U.S. at 315-16, 96 S. Ct. at 2567-68. Thus, it is clear that the Supreme Court does not deem all arbitrary treatment offensive to the Fourteenth Amendment. To a spry octogenarian, of course, a mandatory retirement age is arbitrary: it does not permit an assessment of his or her individual capacities. To violate the Equal Protection Clause, however, the *arbitrary line itself* must have no rational basis. See *Gregory*, 501 U.S. at 472, 111 S. Ct. at 2407. In short, the Equal Protection Clause permits state action—if it has a rational basis—that may look like arbitrariness.

By contrast, the ADEA was enacted to combat *all* arbitrariness, unconstitutional or not. Its legislative history shows that Congress particularly deplored, and wished to ban, arbitrary age limits that overlooked some individuals' abilities. See *E.E.O.C. v. Wyoming*, 460 U.S. 226, 231, 103 S. Ct. 1054, 1057-58, 75 L.Ed.2d 18 (1983); see also 29 U.S.C. § 621(a)(2) (statement of findings and purpose) ("the setting of arbitrary age limits regardless of potential for job performance has become a common practice"). Not surprisingly, the Supreme Court has read the ADEA to prohibit arbitrary line-drawing—even line-drawing that has a rational basis. "It is the very essence of age discrimination for

an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L.Ed.2d 338 (1993). "Thus the ADEA commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.' . . . The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Id.* at 611, 113 S. Ct. at 1706 (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422, 105 S. Ct. 2743, 2756, 86 L.Ed.2d 321 (1985)).

The ADEA accordingly puts mandatory retirement ages to a much more rigorous test than the Equal Protection Clause. A rational basis does not suffice. *Criswell*, 472 U.S. at 421, 105 S.Ct. at 2755. Rather, "[u]nless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, the age selected for mandatory retirement less than 70 must be an age at which it is highly impractical for the employer to [e]nsure by individual testing that its employees will have the necessary qualifications for the job." *Id.* at 422-23, 105 S. Ct. at 2756; *see also Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir.1977) (finding a mandatory maximum hiring age violative of ADEA, but not of the Equal Protection Clause).

Mandatory age limits are not the only illustration of the gulf between the elderly's rights under the Equal Protection Clause and the elderly's rights under the ADEA. State action that has a disparate impact on old workers probably does not violate the Equal Protection Clause, but it can violate the ADEA. *Compare Washington v. Davis*, 426 U.S. 229, 239-40, 96 S. Ct. 2040,

2047-48, 48 L.Ed.2d 597 (1976) (rejecting a disparate-impact theory of violation of the Equal Protection Clause even for suspect classifications), *with MacPherson v. University of Montevallo*, 922 F.2d 766, 770-73 (11th Cir. 1991) (recognizing a disparate-impact claim theory under the ADEA). Some courts have held that the ADEA so far overshadows equal protection rights that the ADEA has completely displaced 42 U.S.C. § 1983 as a vehicle for an age discrimination claim. *See Lafleur v. Texas Dep't of Health*, 126 F.3d 758, 760 (5th Cir. 1997); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1366-67 (4th Cir. 1989). Even where such a § 1983 claim is recognized, the Fourteenth Amendment has been held to permit demotion of a worker for the proffered rational reason that new, young, and attractive faces were needed in her stead—practically a paradigmatic ADEA violation. *See Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 469, 472 (1st Cir. 1990). And one court has gone so far as to question the existence of any constitutional right against age-motivated individual employment actions. *See Whitacre v. Davey*, 890 F.2d 1168, 1169 n. 3 (D.C. Cir. 1989).

As one might expect after considering these differences, Congress's reasons for amending the ADEA to subject states to its restraints did not lie in concern for the Constitution. The reports accompanying the 1974 amendments do not mention the Constitution at all. *See* H.R. Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2849-50. Congressional debate over the amendments, which were included in the Fair Labor Standards Act of 1974, was silent on constitutional violations. *See* 120 Cong. Rec. 7306-49, 8759-69 (1974). The supporters simply thought it was a good idea, not that it furthered enforcement of constitutional

rights. See 1974 U.S.C.C.A.N. at 2849 ("Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group.") (quoting Richard M. Nixon Address (March 23, 1972)).

In sum, the ADEA has created a new class of rights, but not in response to any threat to constitutional rights. The ADEA thus fails *Boerne's* standard for enforcement legislation. Because the ADEA is not a valid exercise of Congress's § 5 authority, Congress could not have abrogated the states' Eleventh Amendment immunity to suit.

#### D. *Is the ADA Enforcement Legislation?*

The ADA is not a valid enforcement statute for the same two reasons the ADEA is not. First, like the aged, the disabled enjoy no special rights under the Equal Protection Clause.<sup>2</sup> The Supreme Court has never found the disabled to be a suspect or even quasi-

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<sup>2</sup> Here I respectfully part company with Chief Judge Hatchett and the Ninth, Eighth, and Fifth Circuits. I agree in general with those circuits' analyses of the scope of Congress's § 5 power. See *Autio v. AFSCME, Local 3139*, — F.3d — (8th Cir. 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 432 (5th Cir.1998); *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir.), *pet. for cert. filed*, 66 U.S.L.W. 3308 (1997). The *Clark* court concludes that the ADA lies within Congress's enforcement power because the Constitution prohibits discrimination against disabled people. See *id.* This reasoning does not go far enough; it matters *what kind* of discrimination the Constitution prohibits, and whether the ADA was aimed at that kind of discrimination. The *Coolbaugh* and *Autio* courts make essentially the same mistake. See *Coolbaugh*, 136 F.3d at 441 (Smith, J., dissenting).



suspect class. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46, 105 S. Ct. 3249, 3257, 87 L.Ed.2d 313 (1985) (declining to “set out on [the] course” leading to quasi-suspect status for the disabled and infirm); *see also Heller v. Doe by Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (confirming this position). State action discriminating against the mentally retarded, a subset of the disabled, is subject to only rational basis review. *City of Cleburne*, 473 U.S. at 446, 105 S. Ct. at 3258. The lower courts have interpreted these holdings to require only rational basis review for all discrimination against the disabled. *See, e.g., Lussier v. Dugger*, 904 F.2d 661, 670-71 (11th Cir. 1990). And this review is not searching: “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” *Heller*, 509 U.S. at 321, 113 S. Ct. at 2643.

By contrast, the ADA prohibits distinctions built on generalizations—even if rational. It prohibits discrimination for practically any reason that does not reflect a business necessity. *See* 42 U.S.C. § 12112(a); *see also Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1132 (11th Cir.) (listing elements of prima facie ADA claim), *amended on reh’g in other part*, 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 2453, 138 L.Ed.2d 211 (1997). It requires assessment of each employee’s abilities and reasonable accommodation to the point of undue hardship. *See* 42 U.S.C. § 12111(8) (defining “qualified individual with a disability” as one who can perform essential functions of job with reasonable accommodation); *id.* § 12112(b)(5)(A) (defining discrimination as failure to make reasonable accommodations, unless accommodation would create undue

hardship for the employer); H.R. Rep. No. 101-485, at 58, *reprinted in* 1990 U.S.C.C.A.N. 303, 340 (“[C]overed entities are required to make employment decisions based on facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.”). Thus, the ADA provides much greater protection for the disabled than does the Equal Protection Clause.

The second reason the ADA is not enforcement legislation is that it was unaccompanied by any finding that widespread violation of the disabled’s constitutional rights required the creation of prophylactic remedies. In the legislative history, Congress did not even mention that the ADA was meant to remedy Fourteenth Amendment violations. The committee reports that accompany the Act emphasize the discouraging effect of employment discrimination on the disabled and the costs to society of caring for those who could care for themselves, absent discrimination. *See, e.g.*, H.R. Rep. No. 101-485, at 41-47, *reprinted in* 1990 U.S.C.C.A.N. 303, 323-29. Far from implying that this state of affairs resulted from violations of any constitutional rights, the legislative history and the Act itself show that Congress was dismayed by the lack of rights the disabled enjoyed before the Act’s passage. *See* 42 U.S.C. § 12101(a)(4) (“[I]ndividuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination[.]”); *see, e.g., id.* at 47-48, 1990 U.S.C.C.A.N. at 329-30. Altruistic and economic concerns motivated this Act—not defense of the Constitution. The laudability of Congress’s goals provides no exception to the limits on Congress’s Fourteenth Amendment power.

Like the ADEA, the ADA was not enforcement legislation under *Boerne's* rule. Congress therefore could not abrogate the states' immunity.

### III. Conclusion

For the foregoing reasons, I would: affirm the dismissal in *MacPherson*; and reverse the denials of the motions to dismiss in *Kimel* and *Dickson*, and remand with instructions to dismiss for want of jurisdiction.

**APPENDIX B**

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

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**CASE No. TCA 95-40194-MMP**  
**J. DANIEL KIMEL, JR., ET AL., PLAINTIFFS**

*v.*

**FLORIDA BOARD OF REGENTS, DEFENDANT**

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**ORDER**

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[Filed May 17, 1996]

This cause comes before the Court on the following pending motions:

- (1) Maxine Stern's motion for substitution (Doc. 84) – to which Defendant has responded (Doc. 94); and
- (2) Defendant's motion to dismiss (Doc. 86) – to which Plaintiffs have responded (Doc. 96).

Each of these motions is addressed below.

**DISCUSSION:**

**I. Maxine Stern's Motion For Substitution (Doc. 84):**

Maxine Stern, the wife of Plaintiff Jerome Stern, has filed a statement of fact of death of Jerome Stern (Doc. 85). Mrs. Stern represents that there will be no administration of her husband's estate, since she jointly held

all property with her husband. Mrs. Stern therefore moves for substitution as a party-plaintiff in this action (Doc. 84), pursuant to Federal Rule of Civil Procedure 25(a).

Defendant objects on the ground that Mrs. Stern seeks substitution solely in her capacity as Jerome Stern's surviving widow. According to Defendant, spousal capacity alone is insufficient to permit substitution; instead, Defendant contends that the personal representative of Mr. Stern's estate is the appropriate person to substitute. Defendant further states that because Mr. Stern had a will and lineal descendants, Mrs. Stern should not be substituted until such time as she is appointed the administrator of Mr. Stern's estate. Defendant relies on *Marcano v. Off-shore Venezuela*, 497 F. Supp. 204 (E.D. La. 1980), to support its conclusion that Mrs. Stern's motion should be denied.

Federal Rule of Civil Procedure 25 controls the substitution of parties, and provides that a motion under the rule ". . . . may be made by any party or by the successors or representatives of the deceased party. . . . ." Fed. R. Civ. P. 25(a). Courts interpreting this rule have held that "the surviving spouse must either notify the Court that the estate has been distributed without being filed for probate, or she must become appointed executrix of decedent's estate." *Hanover Ins. Co. v. White Kitchen Square, Ltd.*, No. 93-1826, 1994 WL 151094, at \*1 (E.D. La. 1994) (emphasis added). *Accord* *McSurely v. McClellan*, 753 F.2d 88, 98-99 (D.C. Cir.), *cert. denied*, 474 U.S. 1005, 106 S. Ct. 525, 88 L. Ed. 2d 457 (1985); *Hardy v. Kaszycki & Sons Contractors, Inc.*, 842 F. Supp. 713, 716 (S.D.N.Y. 1993); *Gronowicz v. Leonard*, 109 F.R.D. 624, 626 (S.D.N.Y.



1986). *Cf. Kilgo v. Bowman Transp., Inc.*, 87 F.R.D. 26, 27 (N.D. Ga. 1980) (individual named as executor in decedent plaintiff's will who elected statutory share rather than probating will and becoming executor of decedent's estate, was substitutable as a "proper party.").

In the case sub judice, although Mr. Stern had a will, Mrs. Stern has duly notified the Court that (1) there will be no administration of Mr. Stern's estate, and (2) she jointly held all Mr. Stern's property with him. Under the authority of the foregoing line of cases, Mrs. Stern is clearly a distributee of an unprobated estate, and is accordingly entitled to be substituted in the stead of her deceased husband. Motion for substitution (Doc. 84) is GRANTED.

## **II. Defendant's Motion To Dismiss (Doc. 86):**

Defendant has moved to dismiss Plaintiffs' claims against it under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, predicated on the grounds of Eleventh Amendment immunity (Doc. 86). Defendant maintains that Congress did not abrogate the states' rights to Eleventh Amendment Immunity when it passed the ADEA, arguing that (1) Congress did not include express language in the Act that it was revoking such immunity, and (2) Congress did not adopt the Act pursuant to a valid exercise of power under the Fourteenth Amendment. Defendant instead contends that the Act was passed pursuant to Congress' exercise of its expansive Commerce Clause powers, citing a litany of legislative history and case law, including statutory construction under *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). Defendant concludes by asserting that since the State of Florida has not consented to

being sued, the Eleventh Amendment provides an absolute bar to this suit.

The Eleventh Amendment is an absolute bar to a suit for damages by an individual against a state or its agencies in federal court. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). This bar applies to suits by the citizens of a state against their own state. *Gamble v. HRS*, 779 F.2d 1509, 1511 (11th Cir. 1986). The Eleventh Amendment bar, however, can be lifted in two ways. First, Congress may abrogate the states' immunity via its powers under § 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). Second, a state may waive its Eleventh Amendment immunity and consent to suit in federal court. *Edelman*, 415 U.S. at 673, 94 S. Ct. at 1360-61. An examination of relevant case law demonstrates that Congress has expressly abrogated the state's Eleventh Amendment immunity to ADEA claims pursuant to its authority under § 5 of the Fourteenth Amendment.

As an initial matter, Defendant is simply wrong in implying that the absence of express language in the ADEA that Congress was abrogating the states' Eleventh Amendment immunity somehow shows that Congress did not intend to revoke such immunity. In fact, Congress expressed its intention to abrogate the states' immunity by including in the ADEA's definition of "employer" a "State and any . . . agency or instrumentality of a State . . ." See 29 U.S.C. § 626(b). Circuit courts that have considered this issue have reached similar conclusions. See, e.g., *Hurd v. Pittsburg State Univ.*, 29 F.3d 564, 564-65 (10th Cir.), cert. denied, 115 S. Ct. 321, 130 L. Ed. 2d 282 (1994); *Bell v. Purdue Univ.*, 975 F.2d 422, 425 n.5 (7th Cir. 1992); *Santiago v.*

*New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir. 1991), *cert. denied*, 502 U.S. 1094, 112 S. Ct. 1168, 117 L. Ed. 2d 414 (1992); *Ramírez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700-01 (1st Cir. 1983).

Defendant's second argument, that the ADEA was passed pursuant to Congress' Commerce Clause power and not the Fourteenth Amendment, is also without merit.<sup>1</sup> While the Supreme Court has held that the ADEA was a valid exercise of Congress' powers under the Commerce Clause, the Court also declined to decide whether the ADEA could also be upheld under § 5 of the Fourteenth Amendment. *EEOC v. Wyoming*, 460 U.S. 226, 243, 103 S. Ct. 1054, 1064, 75 L. Ed. 2d 18 (1983). Nevertheless, the majority of circuit courts that have addressed the issue have concluded that ADEA was also a proper exercise of Congressional authority under the Fourteenth Amendment. *See, e.g., Ramírez*, 715 F.2d at 697-700; *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990); *EEOC v. Wyoming Retirement Sys.*, 771 F.2d 1425, 1428 & n.1 (10th Cir. 1985). District courts within the Eleventh Circuit have reached similar conclusions. *See, e.g., Griswold v. Alabama Dep't Indus. Relations*, 903 F. Supp. 1492, 1496 (M.D. Ala. 1995); *Brogdon v. Alabama Dept' of Econ. & Comm. Aff.*, 864 F. Supp. 1161, 1165 (M.D. Ala. 1994).

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<sup>1</sup> Defendant makes this argument in an attempt to show that Congress lacked the power to abrogate the states' Eleventh Amendment immunity to ADEA claims. According to Defendant, the Supreme Court's recent narrowing of congressional Commerce Clause power [*see Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996)] precludes Congress from revoking such immunity under its Commerce Clause powers.

Consequently, Defendant's motion to dismiss on the basis of Eleventh Amendment immunity (Doc. 86) is DENIED.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Maxine Stern's motion for substitution (Doc. 84) is GRANTED. The clerk is directed to substitute Maxine Stern as a party-plaintiff for her deceased husband, Jerome Stern.

2. Defendant's motion to dismiss (Doc. 86) is DENIED.

DONE AND ORDERED this 17th day of May, 1996.

/s/ MAURICE M. PAUL  
MAURICE M. PAUL,  
CHIEF JUDGE

**APPENDIX C**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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Civil Action No. 94-AR-2962-S

RODERICK MACPHERSON, ET AL., PLAINTIFF

*v.*

UNIVERSITY OF MONTEVALLO, DEFENDANT

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**MEMORANDUM OPINION**

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[Entered Sep. 9, 1996]

Now before the court is a motion to dismiss filed in the above-styled action by defendant, University of Montevallo, on July 25, 1996. The motion was filed pursuant to Rule 12(b)(1), Fed. R. Civ. P. Plaintiffs, Roderick MacPherson and Marvin Narz, allege that defendant has violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), as well as, plaintiffs' right to freedom of speech guaranteed by the First Amendment. Plaintiffs consent to the dismissal of their First Amendment claims.<sup>1</sup> Accordingly, the only issue in contention for this motion to dismiss is whether the University of Montevallo, as an instrumentality of the State of

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<sup>1</sup> See Plaintiffs' brief at 2.



Alabama,<sup>2</sup> is entitled to Eleventh Amendment immunity. Because defendant has demonstrated that it is entitled to Eleventh Amendment immunity, this court lacks subject matter jurisdiction over the ADEA claim, and defendant's motion to dismiss is due to be granted.

### **FACTS**

Plaintiffs, MacPherson and Narz, allege that they are employed by defendant as associate professors and have been subjected to discrimination based upon their age. MacPherson and Narz aver that they are 49 and 50 years old respectively. Plaintiffs allege that defendant has engaged in a pattern and practice of discrimination against them and a continuing practice of treating younger faculty members more favorably than older faculty members with regard to salaries and promotions. Furthermore, plaintiffs aver that defendant has used an age-based evaluation system to discriminate against plaintiffs with regard to promotions, assignments, benefits and salaries.

Plaintiffs further allege that defendant has retaliated against them based upon previous EEOC charges and a previous lawsuit against same defendant for age discrimination, CV 88-B-1341-S. Plaintiffs allege that the previous lawsuit was settled and is subject to a confidentiality agreement. Plaintiffs claim that defendant has engaged in a continuing practice of discrimination and retaliation against them.

### **ANALYSIS**

In Count I, MacPherson and Narz allege that the University of Montevallo discriminated against them in violation of the antidiscrimination provisions of the

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<sup>2</sup> See Ala. Code 1975, § § 16-54-1 through 16-54-18.

ADEA. MacPherson and Narz are clearly within the class of persons protected by the ADEA. *See* 29 U.S.C. § 631(a) (1996). Because the relevant section of the ADEA makes it illegal for an employer to . . . discriminate against any individual . . . because of such individual's age," 29 U.S.C. § 623(a)(1), MacPherson and Narz have the statutory foundation for an ADEA claim.<sup>3</sup> As a result, the court must determine whether the Eleventh Amendment immunizes defendant from plaintiffs' ADEA claims.<sup>4</sup>

When determining if the Eleventh Amendment immunizes a particular governmental entity from suit in federal court, the court must proceed through a multi-tiered analysis. First, the court must determine if the governmental entity is the alter-ego of or an arm of the state and therefore entitled to Eleventh Amendment immunity. *See, e.g., Harden v. Adams*, 760 F.2d 1158 (11th Cir.), *cert. denied sub nom. Grimmer v. Harden*, 474 U.S. 1007, 106 S. Ct. 530 (1985). Even if the court determines that the entity falls within the purview of the Eleventh Amendment, the states' immunity is not absolute. Next, the court must apply the second and third steps to determine if the state entity has waived its Eleventh Amendment immunity and/or whether

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<sup>3</sup> The term "employer" includes "a State . . . or any agency or instrumentality of a State. . . ." 29 U.S.C. § 630(b)(2) (1996).

<sup>4</sup> The scope of the Eleventh Amendment to the United States Constitution is textually limited: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. However, the facial reading of the Amendment has been rejected by the Supreme Court. *See Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890). As a result, the States' sovereign immunity in Federal Court is vast.

Congress has lawfully abrogated the states' collective Eleventh Amendment immunity. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 95 S. Ct. 2666 (1976). If Eleventh Amendment immunity is not waived or expressly abrogated, then the Eleventh Amendment serves as a jurisdictional bar to suit. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984).

In the instant action, neither side disputes that the University of Montevallo is an instrumentality of the state. In fact, the issue of whether Universities of the state of Alabama are instrumentalities of the state has already been litigated and decided. See *Harden*, 760 F.2d at 1163-1164 (stating that the Alabama Supreme Court has held that Alabama universities are instrumentalities or agencies of the state). Accordingly, the University of Montevallo is entitled to whatever protection the Eleventh Amendment provides.

Next, the court must turn to step two of the analysis and determine if the University of Montevallo waived its immunity and consented to the present action. The court determines that the University has not waived its Eleventh Amendment immunity in the instant action. Section 14 of the Alabama Constitution states, "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. of 1901, § 14 (1975). Accordingly, Alabama has expressly reserved its sovereign immunity.

Now the court must proceed through the third step of the multi-tiered analysis, namely, whether or not Congress has expressly abrogated the University's immunity. In order to determine if Congress has successfully abrogated the States' Eleventh Amendment immunity, the court must conduct a two-part inquiry. First, the court must determine that the "evidence of

congressional intent [to abrogate is] both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S. Ct. 2397, 2401 (1989). Second, the court must determine whether "Congress possessed the power under the Constitution to abrogate the states' Eleventh Amendment sovereign immunity." *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996).

In addressing Congress' intent to abrogate the states' sovereign immunity through the ADEA, the court concludes that Congress clearly and unmistakably intended to abrogate the States' Eleventh Amendment immunity. Congress expressed its intention by including in the ADEA's definition of "employer" a "State and any . . . agency or instrumentality of a State . . ." 29 U.S.C. § 626(b) (1996). Furthermore, numerous district and circuit courts have come to the same conclusion on the issue of Congress' intent. *See, e.g., Hurd v. Pittsburg State Univ.*, 29 F.3d 564-65 (10th Cir.), *cert. denied*, 115 S. Ct. 321 (1994); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700-01 (1st Cir. 1983).

The next hurdle is the one plaintiffs fail to clear: Does Congress have the power under the United States Constitution to abrogate the states' Eleventh Amendment immunity? The Supreme Court has recently reiterated that Congress cannot invade Eleventh Amendment immunity except "pursuant to a valid exercise of power" conferred by the Constitution. *Seminole Tribe*, 116 S. Ct. at 1123. In determining the sources of power, the Supreme Court had previously found that Congress possessed the power to abrogate the states' sovereign immunity when legislating pursuant to § 5 of the Fourteenth Amendment and the Commerce Clause. *See id.*; *see also Fitzpatrick*, 427 U.S. 445; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.

Ct. 2273 (1989) (holding that Congress could abrogate the Eleventh Amendment pursuant to the Commerce Clause). However, the Supreme Court in *Seminole Tribe* overruled its plurality decision in *Union Gas Co.*, 491 U.S. 1, where the Supreme Court held that Congress could abrogate the Eleventh Amendment pursuant to the Commerce Clause, by stating that “[w]e feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.” *Seminole Tribe*, 116 S. Ct. at 1128.

As a result of the Supreme Court decision in *Seminole Tribe*, the foundation for ADEA cases against states and state entities entitled to Eleventh Amendment immunity has been removed. In *Seminole Tribe*, the Court, among other things, held that Congress cannot abrogate the Eleventh Amendment immunity enjoyed by the State when enacting legislation pursuant to the Commerce Clause. *Id.* at 1131-32. Thus, if the ADEA was enacted by Congress only pursuant to that body’s legislative power granted under the Commerce Clause, the University of Montevallo enjoys absolute immunity to MacPherson’s and Narz’s ADEA claim.

As *Seminole Tribe* makes clear, Congress only has the power to abrogate Eleventh Amendment immunity when enacting legislation pursuant to § 5 of the Fourteenth Amendment. Consequently, the determinative inquiry before this court is whether the ADEA was a valid exercise of that Congressional power. More specifically, because the ADEA as originally enacted in 1967 did not reach state employees, the focus of this court’s attention is whether the 1974 Amendments to the ADEA, which extended coverage of the ADEA to state governments in 29 U.S.C. § 630(b)(2), were passed pursuant to § 5 of the Fourteenth Amendment.



Prior to *Seminole Tribe*, the Supreme Court had held only that the ADEA was a valid exercise of Congress' powers under the Commerce Clause. *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 235-44, 103 S. Ct. 1054, 1059-1064 (1983). In a five—four majority opinion authored by Justice Brennan, the Court expressly left open the question of whether that same conclusion could be reached under § 5 of the Fourteenth Amendment. *Id.* at 243.<sup>5</sup> Justice Stevens, who cast the deciding vote, concurred with the majority but added that his vote was limited to “construing the scope and power granted to Congress by the Commerce Clause of the Constitution.” *Id.* at 244 (Stevens, J., concurring).

*Wyoming*, however, presents one of those rare instances where a dissenting opinion provides the more useful statement of the law. Given the majority's reluctance to take up the issue, the dissent joined by the four remaining members of the Court takes on added significance. In that opinion, Chief Justice Burger, joined by Justice Powell, Rehnquist and O'Connor, persuasively argued that the ADEA was not and could not have been passed pursuant to the Fourteenth Amendment. *Id.* at 259-63.

In addition, this court finds defendant's reasoning that the ADEA was passed along with the Fair Labor Standards Act pursuant to the same vehicle, the

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<sup>5</sup> Plaintiffs' argument that “the Court has already declared that Congress acted properly in extending ADEA to the states” is mistaken. The Supreme Court has ruled upon the question of whether the ADEA was properly extended to the states via the Commerce Clause. The Supreme Court expressly reserved a ruling on whether the ADEA was premised upon § 5 of the Fourteenth Amendment. This court holds that it was not.

Commerce Clause, more plausible. If Congress intended to amend the ADEA based upon § 5 of the Fourteenth Amendment it could have done so, as it did with respect to the 1972 amendments to Title VII.<sup>6</sup> See H.R. Rep. No. 92-238, 92d Cong., 2d Sess., *reprinted* in 1972 U.S. Code Cong. & Ad. News 2137, 2154. In fact, if Congress had any desire to base the ADEA on anything other than the Commerce Clause, it had and for that matter still has the ability to amend the ADEA separately and distinctly from the Fair Labor Standards Act. Unless and until Congress chooses § 5 of the Fourteenth Amendment as its vehicle for amending the ADEA, the ADEA's bedrock is the same as it has been since its inception in 1967, the Commerce Clause. Probably Congress chose not to invoke the Fourteenth Amendment as a basis for the ADEA because the Fourteenth Amendment is not a logical basis for a prohibition against age discrimination by a state.

After careful consideration of the issue and absent any expression to the contrary from the Eleventh Circuit, this court agrees with the dissenters in *Wyoming* and concludes that the ADEA was enacted pursuant to the Commerce Clause and not the Fourteenth Amendment. See *Black v. Goodman*, 736 F. Supp. 1042 (D. Mont. 1990); *Farkas v. New York State Dept. of Health*, 554 F. Supp. 24, 27-8 (N.D.N.Y. 1982), *aff'd*, 767 F.2d 907 (2d Cir.), *cert. denied*, 474 U.S. 1033, 106 S. Ct. 596 (1985). But see *Heiar v. Crawford County*, 746 F.2d

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<sup>6</sup> This Court takes note of the well reasoned analysis of the First Circuit Court of Appeals in *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 700 (1st Cir. 1983). However, this court fundamentally disagrees with the notion that it slipped the collective minds of Congress to mention the Fourteenth Amendment in the 1974 amendments to the ADEA, but remember it in the 1972 amendments to Title VII.

1190 (7th Cir.), *cert. denied*, 472 U.S. 1072, 105 S. Ct. 3500 (1985); *Griswold v. Alabama Dep't Indus. Relations*, 903 F. Supp. 1492 (M.D. Ala. 1995). Thus, Congress did not abrogate the University of Montevallo's entitlement to Eleventh Amendment immunity in enacting the ADEA. Because the Eleventh Amendment precludes MacPherson and Narz's action against the University of Montevallo, defendant's motion to dismiss will be granted as the court lacks subject matter jurisdiction. A separate and appropriate order will be so entered.

DONE this 9th day of September, 1996.

/s/ WILLIAM M. ACKER, JR.  
WILLIAM M. ACKER, JR.  
UNITED STATES  
DISTRICT COURT

**APPENDIX D**

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF FLORIDA  
PANAMA CITY DIVISION**

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CASE No. 5:9cv207-RH

WELLINGTON N. DICKSON, PLAINTIFF

*v.*

FLORIDA DEPARTMENT OF CORRECTIONS,  
ETC., ET AL., DEFENDANTS

---

**ORDER ON DEFENDANTS' MOTION TO DISMISS**

---

[Filed Nov. 5, 1996]

In this action plaintiff Wellington N. Dickson alleges that his employer, the Florida Department of Corrections, failed to promote him and took other adverse employment action against him in violation of the Age Discrimination in Employment Act ("ADEA") and Americans with Disabilities Act ("ADA").

Mr. Dickson originally named two entities and two individuals as defendants. By order dated October 1, 1996, I dismissed all claims against the individuals, leaving only the two entities as defendants. They also have moved to dismiss.

Their motion raises three issues that warrant discussion: whether Mr. Dickson has named a proper defendant; whether Mr. Dickson's claims are barred by

the Eleventh Amendment; and whether Mr. Dickson has stated a claim for punitive damages under 42 U.S.C. § 1981a. I reject the remaining grounds of the motion to dismiss without discussion.

*The Proper Defendant*

The two remaining defendants, as described in the complaint, are "Florida Department of Corrections, Jackson County" and "Jackson Correctional Institution."

Jackson Correctional Institution has no independent corporate existence. It is, instead, simply part of the state correctional system operated by the Department of Corrections. See § 944.02(1), Fla. Stat. (1995). The Department of Corrections has supervisory and protective care, custody and control over all matters pertaining to all prisons and other state correctional institutions, including Jackson Correctional Institution. See § 945.025, Fla. Stat. (1995). Accordingly, Jackson Correctional Institution is not a suable entity, and all claims purportedly against Jackson Correctional Institution will be dismissed.

The Department of Corrections is a suable entity. See, e.g., *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984). I construe the complaint's reference to the "Florida Department of Corrections, Jackson County" as a reference to the Florida Department of Corrections. As so construed, the complaint names a proper defendant. The action will continue solely as against the Department of Corrections.

*The Eleventh Amendment*

The Department of Corrections contends that the Eleventh Amendment bars Mr. Dickson's ADA and ADEA claims. Mr. Dickson responds that Congress



abrogated the states' immunity in both the ADA and the ADEA.

In determining whether Congress has abrogated the states' Eleventh Amendment immunity, two questions must be addressed: first, whether Congress has unequivocally expressed its intent to abrogate the immunity, and second, whether Congress had authority to do so. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425-26, 88 L.Ed.2d 371 (1985). It is undisputed that Congress expressed its intent to abrogate the states' immunity under the ADA, 42 U.S.C. § 12202, and under the ADEA, 29 U.S.C. § 630(b). Whether Congress had authority to do so is somewhat more problematic.

In *Seminole Tribe v. Florida*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 1114, \_\_\_ L.Ed.2d \_\_\_ (1996), the United States Supreme Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989), and concluded that Congress, by statute, may not override the Eleventh Amendment except under authority of section 5 of the Fourteenth Amendment. The critical question here therefore is whether Congress had authority under section 5 to enact the ADA and ADEA.

While the Eleventh Circuit has not addressed this question, the great weight of authority holds that Congress did have such authority under section 5. See, e.g., *Hurd v. Pittsburg State University*, 29 F.3d 564 (10th Cir. 1994) (ADEA), *cert. denied*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 321, 130 L.Ed.2d 282 (1994); *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984) (ADEA), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983) (ADEA); *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982) (ADEA); *Mayer v. University of Minnesota*, No. CIV. 4-95-444, 1996 WL 599234 (D. Minn. Oct.

15, 1996) (ADA); *Niece v. Fitzner*, No. 94-CV-70718-DT, 1996 WL 588217 (E.D. Mich. Oct. 10, 1996) (ADA); *Armstrong v. Wilson*, No. C 94-2307 CW, 1996 WL 580847 (N.D. Cal. Sept. 20, 1996) (ADA); *Griswold v. Alabama Dep't of Indus. Relations*, 903 F. Supp. 1492 (M.D. Ala. 1995) (ADEA). *But see MacPherson v. University of Montevallo*, No. 94-AR-2962-S, 1996 WL 521201 (N.D. Ala. Sept. 9, 1996) (agreeing with the dissenters in *EEOC v. Wyoming*, 460 U.S. 226, 235-44, 103 S. Ct. 1054, 1059-64, 75 L.Ed.2d 18 (1983), that "the ADEA was enacted pursuant to the Commerce Clause and not the Fourteenth Amendment").

Like the majority of courts that have addressed the issue, I conclude that Congress had authority under section 5 of the Fourteenth Amendment to enact the ADEA and ADA. Accordingly, the Eleventh Amendment does not bar Mr. Dickson's ADEA and ADA claims.

### *Punitive Damages*

Finally, the Department correctly asserts that Mr. Dickson cannot recover punitive damages under 42 U.S.C. § 1981a. Section 1981a(b)(1) provides: "A complaining party may recover punitive damages under this section against a respondent (*other than a government, government agency or political subdivision*) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." (Emphasis added). The language plainly excludes Mr. Dickson's claims against the Department.

Accordingly,

IT IS ORDERED:

Defendants' motion to dismiss (document 18) is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's claims for punitive damages are dismissed as are all claims against Jackson Correctional Institution. The motion to dismiss is denied in all other respects.

SO ORDERED this 5th day of November, 1996.

/s/ ROBERT L. HINKLE  
ROBERT L. HINKLE  
United States  
District Judge

**APPENDIX E**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

No. 96-2788

D.C. Docket No. 95-40194-MP

J. DANIEL KIMEL, JR.; RALPH C. DOUGHERTY;  
BURTON H. ALTMAN; ROBERT W. BEARD;  
VALDALL K. BROCK, ET AL., PLAINTIFFS-APPELLEES

DORIS C. BAKER, ET AL., PLAINTIFFS

versus

STATE OF FLORIDA BOARD OF REGENTS,  
DEFENDANT-APPELLANT

---

No. 96-3773

D.C. Docket No. 5:96-CV-207-RH

WELLINGTON N. DICKSON, A.K.A. DUKE,  
PLAINTIFF-APPELLEE

versus

FLORIDA DEPARTMENT OF CORRECTIONS,  
JACKSON COUNTY, DEFENDANT-APPELLANT

JACKSON CORRECTIONAL INSTITUTION;  
JIM FOLSOM, AND JAMES EDWARD CHILDS,  
A.K.A. J.E. CHILDS, MAJOR, DEFENDANTS

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF FLORIDA

---

No. 96-6947

D.C. Docket No. CV-94-AR-2962-S

RODERICK MACPHERSON; MARVIN NARZ,  
PLAINTIFFS-APPELLANTS

versus

UNIVERSITY OF MONTEVALLO,  
DEFENDANT-APPELLEE

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,  
AMICUS

UNITED STATES OF AMERICA,  
INTERVENOR-APPELLANT

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF ALABAMA

---

[Filed Aug. 17, 1998]

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Before: HATCHETT, Chief Judge, EDMONDSON and  
COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellees,  
J. Daniel Kimel, Jr., et al., is denied

The petition for rehearing filed by the Appellee,  
Wellington N. Dickson, is denied.

The petition(s) for rehearing filed by the Intervenor/  
Appellant, United States of America, is denied.



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ENTERED FOR THE COURT:

/s/ JUDGE EDMONDSON  
JUDGE EDMONDSON  
UNITED STATES  
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

---

No. 96-3773

WELLINGTON N. DICKSON, A.K.A. DUKE,  
PLAINTIFF-APPELLEE

versus

FLORIDA DEPARTMENT OF CORRECTIONS,  
JACKSON COUNTY, DEFENDANT-APPELLANT  
JACKSON CORRECTIONAL INSTITUTION, JIM FOLSOM,  
AND JAMES EDWARD CHILDS, A.K.A. J. E. CHILDS,  
MAJOR, DEFENDANTS

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF FLORIDA

---

[Filed Aug. 17, 1998]

---

Before: HATCHETT, Chief Judge, EDMONDSON and  
COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellant,  
Florida Department of Corrections is denied.

ENTERED FOR THE COURT:

/s/ JUDGE EDMONDSON  
JUDGE EDMONDSON  
UNITED STATES  
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

---

No. 96-2788

D.C. Docket No. 95-40194-MP

J. DANIEL KIMEL, JR.; RALPH C. DOUGHERTY;  
BURTON H. ALTMAN; ROBERT W. BEARD;  
VALDALL K. BROCK, ET AL., PLAINTIFFS-APPELLEES

DORIS C. BAKER, ET AL., PLAINTIFFS

versus

STATE OF FLORIDA BOARD OF REGENTS,  
DEFENDANT-APPELLANT

---

No. 96-3773

D.C. Docket No. 5:96-CV-207-RH

WELLINGTON N. DICKSON, A.K.A. DUKE,  
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versus

FLORIDA DEPARTMENT OF CORRECTIONS,  
JACKSON COUNTY, DEFENDANT-APPELLANT

JACKSON CORRECTIONAL INSTITUTION;  
JIM FOLSOM, AND JAMES EDWARD CHILDS,  
A.K.A. J.E. CHILDS, MAJOR, DEFENDANTS

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF FLORIDA

---

No. 96-6947

ROBERT MACPHERSON; MARVIN NARZ,  
PLAINTIFFS-APPELLANTS

versus

UNIVERSITY OF MONTEVALLO,  
DEFENDANT-APPELLEE

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,  
AMICUS

UNITED STATES OF AMERICA, INTERVENOR-  
APPELLANT

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF ALABAMA

---

Before: HATCHETT, Chief Judge, EDMONDSON and  
COX, Circuit Judges.

ON PETITION(S) FOR REHEARING AND SUG-  
GESTION(S) OF REHEARING EN BANC (Opinion  
\_\_\_\_\_, 11th Cir., 19 \_\_, \_\_\_\_\_ F.2d \_\_\_\_\_).

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5),

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the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ JUDGE EDMONDSON

JUDGE EDMONDSON

UNITED STATES

CIRCUIT JUDGE



IN THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

---

No. 96-3773

WELLINGTON N. DICKSON, A.K.A. DUKE,  
PLAINTIFF-APPELLEE

versus

FLORIDA DEPARTMENT OF CORRECTIONS,  
JACKSON COUNTY, DEFENDANT-APPELLANT  
JACKSON CORRECTIONAL INSTITUTION, JIM FOLSOM,  
AND JAMES EDWARD CHILDS, A.K.A. J. E. CHILDS,  
MAJOR, DEFENDANTS

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF FLORIDA

---

[Filed Aug. 17, 1998]

---

Before: HATCHETT, Chief Judge, EDMONDSON and  
COX, Circuit Judges.

ON PETITION(S) FOR REHEARING AND SUG-  
GESTION(S) OF REHEARING EN BANC (Opinion  
\_\_\_\_\_ 11th Cir., 19 \_\_, \_\_\_\_\_ F.2d \_\_\_\_\_).

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no  
member of this panel nor other Judge in regular active  
service on the Court having requested that the Court  
be polled on rehearing en banc (Rule 35, Federal Rules  
of Appellate Procedure; Eleventh Circuit Rule 35-5),

85a

the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ JUDGE EDMONDSON

JUDGE EDMONDSON

UNITED STATES

CIRCUIT JUDGE

**APPENDIX F****CONSTITUTION OF THE UNITED STATES****AMENDMENT XI**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**AMENDMENT XIV**

**SECTION 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \* \* \*

**SECTION 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, provides in part:

**§ 621. Congressional statement of findings and purpose**

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

\* \* \* \* \*

## **§ 623. Prohibition of age discrimination**

### **(a) Employer practices**

It shall be unlawful for an employer—

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

\* \* \* \* \*

### **(d) Opposition to unlawful practice; participation in investigations, proceedings, or litigation**

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

\* \* \* \* \*



- (f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause**

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section

1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

\* \* \* \* \*

**(j) Employment as firefighter or law enforcement officer**

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such an action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of

1996[ ] if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

\* \* \* \* \*

#### **§ 626. Recordkeeping, investigation, and enforcement**

##### **(a) Attendance of witnesses; investigations, inspections, records, and homework regulations**

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

- (b) **Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

**(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial**

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

**(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion**

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.



Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

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### § 630. Definitions

For the purposes of this chapter—

(a) The term “person” means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term “employer” means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

\* \* \* \* \*

(f) The term “employee” means an individual employed by an employer except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such

officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

\* \* \* \* \*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of em-

ployees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefit, including such benefits provided pursuant to a bona fide employee benefit plan.

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### **§ 631. Age limits**

#### **(a) Individuals at least 40 years of age**

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

#### **(b) Employees or applicants for employment in Federal Government**

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

#### **(c) Bona fide executives or high policymakers**

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of

such employee, which equals, in the aggregate, at least \$44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

\* \* \* \* \*

**§ 633a. Nondiscrimination on account of age in  
Federal Government employment**

**(a) Federal agencies affected**

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Con-

gress shall be made free from any discrimination based on age.

- (b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification**

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and



- (3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

**(c) Civil actions; jurisdiction; relief**

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

**(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices**

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one

hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

**(e) Duty of Government agency or official**

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

**(f) Applicability of statutory provisions to personnel action of Federal departments, etc.**

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

\* \* \* \* \*

The Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), provides in part:

**§ 216. Penalties**

**(b) Damages; right of action; attorney's fees and costs; termination of right of action**

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right to any employee to become a party plaintiff to any such action, shall terminate upon

the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable thereof under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.